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Supreme Court, U.S.
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IN THE
Supreme Court of the United States

ANTHONY T. DAVIS,

Petitioner,

vs.

BEN CURRY, WARDEN

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Court of Appeals for the Ninth Circuit held that the admission of hearsay in violation of Petitioner's Confrontation Clause rights did not have a substantial and injurious effect upon the jury's verdict even though (1) not a single witness to the events at issue testified at trial; (2) the hearsay went to the crux of the case and was not cumulative; (3) the prosecutor relied heavily on the hearsay in his opening statement and closing argument; and (4) during deliberations, the jury asked to have the hearsay re-read twice.

The question presented is: By failing to consider the importance of the Confrontation Clause violation in the actual trial and the actual effect on the jury, does the Ninth Circuit's decision conflict with this Court's precedent and warrant summary reversal?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court of Appeals for the Ninth Circuit were Petitioner-Appellant Anthony T. Davis and Respondent-Appellee D. L. Runnels, warden of High Desert State Prison. Petitioner has been transferred to Soledad Correctional Training Facility, whose warden is Respondent Ben Curry.

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PETITION FOR A WRIT OF CERTIORARI

Anthony T. Davis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is unreported. An order denying rehearing and rehearing en banc (Pet. App. 49a) is unreported.

The district court's decision (Pet. App. 8a) is unreported.

The opinion of the California Court of Appeal affirming Davis's conviction on direct appeal (excerpted at Pet. App. 50a) is unreported.

JURISDICTION

Petitioner seeks review of a judgment of the court of appeals entered on May 20, 2009. Rehearing and rehearing en banc were denied on June 30, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have

> compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section 2254 of Title 28, United States Code, provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
>> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>>
>> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

A. Introduction

This petition concerns the Ninth Circuit's decision to affirm the denial of Anthony Davis's petition for a federal writ of habeas corpus under 28 U.S.C. § 2254. Davis was convicted of assault with a deadly weapon (a hammer) and sentenced to 38 years to life in prison under California's "three strikes" law. His conviction came after only two and a half hours of trial testimony. No witness to the events at issue testified. Except for one medical expert, all the testimony was in the form of conflicting hearsay statements by the alleged victim, Ella Alexander, and her mother.

Davis challenged on Confrontation Clause grounds the admission of testimony regarding an interview of Alexander that San Francisco Police Sergeant John Sanford, a domestic violence investigator, conducted eight hours after the incident. The Ninth Circuit panel (Sidney R. Thomas, Richard A. Paez, CJJ, and David A. Ezra, DJ) held that the California Court of Appeal unreasonably applied clearly established Federal law as determined by this Court by concluding that the admission of Sgt. Sanford's testimony did not violate Davis's Confrontation Clause rights. Pet. App. 3a–6a.

The Ninth Circuit held the constitutional error was harmless, but this holding rests on two legal errors. First, the Ninth Circuit reversed the correct burden of persuasion, requiring *Davis* to show harm. Pet. App. 6a. Next, the Ninth Circuit held the error did not have a substantial and injurious effect on the jury's verdict because the improperly admitted testimony was "one of several pieces of evidence the jury had before it that discredited Davis's self-defense theory." Pet. App. 6a–7a. This is the wrong legal standard. The presence of sufficient evidence of guilt is not enough to deem an error harmless. In each case, the reviewing court must analyze the actual effect the error likely had on the jury.

Here, that effect is indisputable. The prosecution introduced Sgt. Sanford's testimony specifically to rebut evidence that Davis acted in self-defense when he struck Alexander; Sgt. Sanford's testimony was the only direct evidence that Davis did not act in self-defense; in closing arguments, the prosecutor relied extensively on Sgt. Sanford's testimony; and during deliberations, the jury *twice* asked for readbacks from his testimony.

The Ninth Circuit did not acknowledge or even advert to these circumstances, which were discussed in detail in Davis's briefing and in a timely petition for rehearing. As the Ninth Circuit's decision obviously and blatantly conflicts with the decisions of this Court, summary reversal is warranted.

B. Procedural History

Petitioner stood trial in San Francisco Superior Court on charges that he hit his girlfriend, Ella Alexander, with a hammer during an altercation at her home. No witness to the altercation testified at trial. After two and a half hours of testimony by witnesses who repeated out-of-court statements by Alexander and her mother, Gloria Persons, the jury convicted Davis of assault with a deadly weapon, and found true the allegation of inflicting great bodily injury. Appellant's Excerpts of Record ("ER") 264, 357, 363–64. The trial court sentenced Davis to 38 years to life in prison under the California "three strikes" law.

On direct appeal, Davis argued, *inter alia*, that the trial court's admission of hearsay statements by Alexander and Persons violated his federal Confrontation Clause rights under the standards set forth in *Ohio v. Roberts*, 448 U.S. 56 (1980) and *Idaho v. Wright*, 497 U.S. 805 (1990). With regard to the interview of Alexander by Sgt. Sanford eight hours after the incident, the California Court of Appeal held the hearsay was reliable enough to satisfy the Confrontation Clause because Alexander had been drinking heavily and had suffered a serious head injury. Pet. App. 58a–59a. The California court also held that statements Alexander and Persons made at the scene were properly admitted as spontaneous statements. Pet. App. 60a–69a. Davis filed a timely petition for review, which the California Supreme Court denied without comment on February 21, 2001. ER 503.

Davis filed his petition for a federal writ of habeas corpus on January 30, 2002. ER 520. He challenged the admission of the hearsay statements by Alexander and Persons as violating his clearly established rights under the Confrontation Clause. The district court denied the petition on August 2, 2007, ruling that he had not met the standards of 28 U.S.C. § 2254(d). Pet. App. 34a–41a, 48a.

Davis timely appealed the district court's denial of his habeas petition. In an unpublished decision, the Ninth Circuit held that the California Court of Appeal unreasonably applied this Court's pre-*Crawford* Confrontation Clause precedent by concluding that Sgt. Sanford's interview of Alexander was reliable enough to render cross-examination unnecessary. Pet. App. 3a–6a.

The Ninth Circuit affirmed the denial of Davis's habeas petition, however, holding that the error did not have a substantial and injurious effect upon the jury's verdict. Pet. App. 6a–7a. The Ninth Circuit stated that it had no grave doubt about the effect of the error because Sgt. Sanford's interview was "one of several" pieces of evidence that "discredited" Davis's claim of self-defense. Pet. App. 6a–7a. The Ninth Circuit denied a timely petition for rehearing and rehearing en banc. Pet. App. 49a.

C. Evidence Admitted at Trial[1]

In its case in chief, the prosecution put on two witnesses.

Joseph Salazar, a police officer who reported to the scene of the altercation, testified that when he arrived Alexander told him that Davis had hit her in the head with a hammer, having earlier said, "All right, bitch, I got something for you." Pet. App. 77a–79a, 85a–86a. Officer Salazar also testified that he interviewed Alexander's mother, Gloria Persons, at the scene. Persons told him she had tried to separate Davis and Alexander, who were arguing. Pet. App. 90a. Davis pushed Alexander, who fell onto a couch, and hit her with a hammer. Pet. App. 91a–93a. Officer Salazar did not ask Persons any questions about the events that led up to Alexander being hit. Pet. App. 95a. Over defense objections, the trial court admitted these statements under California Evidence Code § 1240 as spontaneous statements. Pet. App. 78a–79a, 89a–90a.

The other prosecution witness was a police custodian of records, who authenticated a tape recording of a 911 call Persons made after the incident. Pet. App. 98a–102a. On the recording, Persons can be heard telling the dispatcher that Davis "jumped" on Alexander and "busted her head with a hammer." ER 524. The trial court admitted this hearsay as a spontaneous statement. ER 225.

The defense also called only two witnesses.

The first defense witness was the prosecutor himself, who testified that Alexander telephoned him to say she wanted him to drop the charges against Davis because the incident was a drunken accident, although she would not provide details. Pet. App. 107a–111a.

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[1] All the witness testimony at trial is included in the Appendix, along with opening statements and closing arguments.

The other defense witness was Nigel Phillips, a defense investigator, who testified that Alexander telephoned him shortly before trial to explain what had actually happened on the night of the incident. Pet. App. 113a–114a. She said she had been home drinking large quantities of malt liquor with Davis, and they got into an argument. Pet. App. 114a. Davis went upstairs, and Alexander went to the kitchen and grabbed knives. Pet. App. 114a–115a. When Davis came back downstairs, Alexander started lunging and swinging at him with the knives. Pet. App. 115a. She did not say whether she had landed any blows or intended to cut Davis. Pet. App. 118a, 120a.[2] Davis grabbed a hammer and tried to knock the knives out of her hands. Pet. App. 116a. During the melee, the hammer slipped and hit her in the head. Pet. App. 116a. Persons was upstairs at the time and came down afterward and called 911. Pet. App. 116a–117a.

When the defense rested, the prosecutor asked to introduce the statement Alexander had given to Sgt. Sanford from a hospital bed eight hours after the incident. The prosecutor stressed that the statement was more detailed than the other hearsay admitted (Pet. App. 125a) and was not cumulative because:

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[2] Alexander's statements regarding her use of knives were admitted for their truth as declarations against penal interest. (Cal. Evid. Code § 1230.) The remainder of Phillips' testimony regarding what Alexander said was admitted for impeachment purposes only.

> [i]t's rebutting the statement introduced by the defense through Mr. Nigel Phillips. The statement introduced by the People, the spontaneous statement, merely states that Anthony Davis was the one who swung the hammer, causing the injury, and that he made a threat or made a statement coupled with that. [¶] There is a great deal more detail in the statement of all the incidents leading up to that fact.

Pet. App. 127a. Over objection on Confrontation Clause grounds, the trial court allowed Sgt. Sanford to testify in rebuttal pursuant to California Evidence Code § 1370. ER 268.

Sgt. Sanford's testimony, admitted in violation of Davis's clearly established Confrontation Clause rights (Pet. App. 3a–6a), was as follows. Alexander said she and Davis had been drinking and started to argue. Pet. App. 137a, 140a. The argument escalated when Davis "would not leave her alone." Pet. App. 138a. Davis went upstairs and got a hammer. Pet. App. 138a. When Davis returned downstairs, he said "he was tired of her clowning him." Pet. App. 139a. She said, "Why don't you just leave?" Davis responded, "Yeah, but before I leave, I'm going to do something else." Pet. App. 140a. As Alexander sat on the couch, Davis hit her in the head with a hammer. Pet. App. 141a. She had earlier grabbed a knife to protect herself because she was afraid, but could not remember if she had put the knife under the couch before Davis came back downstairs. Pet. App. 142a–143a. Alexander told Sgt. Sanford that after Davis hit her, he said "Oh, my God" and ran out of the house with the telephone receiver in one hand and the hammer in the other. Pet. App. 151a.

The prosecution called its final witness, Dr. Grant Gauger, to rebut evidence that the hammer may have "slipped" in Davis's hand, hitting Alexander in the head. ER 279-81. Dr. Gauger testified that Alexander's medical records showed that she suffered a skull fracture (Pet. App. 153a–154a); it would have taken considerable force to cause her injury (Pet. App. 154a–155a); it was likely to have been caused by a controlled blow rather than a "trivial" movement of a hammer (Pet. App. 156a–157a, 159a–160a); and the fracture was the size of a quarter on the top of her head (Pet. App. 158a, 163a). Dr. Gauger also testified that Alexander had a cut on a finger, for which she was referred to a hand clinic, and an injury to her left arm. Pet. App. 160a–161a.

D. Arguments and Deliberations

The prosecutor relied on Sgt. Sanford's testimony in closing arguments to persuade the jury that Davis was the aggressor. The prosecutor argued that although Alexander admitted getting a knife, she told Sgt. Sanford that she had put the knife under the couch: "[T]he fact is it doesn't rise to self-defense. She has the knife; she said she put it under the couch, which also explains why Officer Salazar never saw it." Pet. App. 174a; *see also* Pet. App. 191a ("Yeah, she grabbed [the knife], but she didn't have it in her hand."). The prosecutor portrayed Davis as causing the argument to escalate into a physical confrontation by going upstairs to get a hammer, "just like she had told John Sanford." Pet. App. 174a.

The prosecutor also emphasized that Alexander could not be the aggressor because she was sitting down at the time: "[S]he tells [Sgt. Sanford] . . . 'I was sitting down when I was hit with a hammer. I was sitting.'" Pet. App. 171a; *see also* Pet. App. 177a ("Ella even admits she was sitting down . . . ."). Despite evidence that Alexander threatened Davis with a knife, "once she sat on the couch, well, the threat's over. Self-defense exists only as long as the real or apparent threatened danger continues to exist." Pet. App. 173a–174a; *see also* Pet. App. 174a ("[S]he may have gotten that knife in anticipation of trouble. We may not like it, but she was sitting on the couch."); Pet. App. 177a ("Because she was sitting down, there is not lawful self-defense."). The prosecutor told the jury no fewer than 22 times that Alexander was sitting down. Pet. App. 170a–177a.

The prosecutor concluded his closing argument by telling the jury that Davis was clearly guilty because he had run out of the house with the hammer in one hand and the telephone receiver in the other (Pet. App. 193a), evidence that Sgt. Sanford provided (Pet. App. 151a).[3]

After the start of deliberations, the jury asked to re-hear "the testimony by Sgt. Sanford regarding the physical confrontation between the victim &

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[3] Earlier, in his opening statement, the prosecutor also emphasized evidence that Sgt. Sanford later provided. The prosecutor stated that although Alexander picked up knives, she had put them down before Davis hit her. Pet. App. 72a ("[Persons] got [Alexander] to put those knives down."). Sgt. Sanford was the only witness who testified that Alexander had put the knife under the couch at some point. Pet. App. 143a. The prosecutor told the jury that Davis had gone upstairs and grabbed a hammer. Pet. App. 73a. Sgt. Sanford was the only witness who provided this testimony. Pet. App. 138a. The prosecutor also suggested that Davis had left the house with the hammer and the phone receiver. Pet. App. 74a.

defendant." Pet. App. 194a. Before stopping deliberations that same day, the jury asked to re-hear Officer Salazar's and Sgt. Sanford's testimony about "Alexander's position prior to being struck." Pet. App. 195a. After an hour of deliberations the following day, the jury returned a verdict of guilty. ER 364.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT DISREGARDED THIS COURT'S HARMLESS ERROR PRECEDENT.

A. Principles of Harmless Error Analysis

On federal habeas review, constitutional error is harmful if it "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637–38 (1993). Where the evidence on harmlessness is in equipoise, the petitioner must win. *O'Neal v. McAninch*, 513 U.S. 432, 437 (1995).

In determining whether a constitutional violation had a substantial and injurious effect, the focus is on what the error meant to the jury:

> [T]he question is, not were [the jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. *The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.*
>
> This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else

> that happened. And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. *This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record.*

Kotteakos v. United States, 328 U.S. 750, 764 (1946) (citations omitted, emphasis added); *see also Brecht*, 507 U.S. at 642–43 (Stevens, J., concurring) (quoting *Kotteakos*); *cf. Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) ("Harmless-error review looks . . . to the basis on which 'the jury *actually rested* its verdict.'" (quoting *Yates v. Evatt*, 500 U.S. 391, 404 (1991) (emphasis added in *Sullivan*))).

In determining whether a trial error had a substantial and injurious effect, key factors include the centrality of the error in the case and the strength of other evidence of guilt. "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence." *Kotteakos*, 328 U.S. at 765; *see Brecht*, 507 U.S. at 639 (error harmless where it was minor and cumulative, and evidence of guilt was "if not overwhelming, certainly weighty"); *Brumley v. Wingard*, 269 F.3d 629, 646 (6th Cir. 2001) (Confrontation Clause violation in admitting testimony could not be deemed harmless because witness was the State's principal witness); *Delguidice v. Singletary*, 84 F.3d 1359, 1364 (11th Cir. 1996) (error in admitting testimony not harmless where it "was the State's only rebuttal of Delguidice's insanity defense"); *Shaw v. Collins*, 5 F.3d 128, 132–33 (5th Cir. 1993) (Confrontation Clause violation in admitting testimony not harmless because testimony "was the linchpin in the State's case").

Another key factor is the prosecutor's emphasis of the improperly admitted evidence in arguments. *See Satterwhite v. Texas*, 486 U.S. 249, 260 (1988) (explaining that the error was not harmless beyond a reasonable doubt, in part, because "the prosecution placed significant weight" on the inadmissible evidence); *Kyles v. Whitley*, 514 U.S. 419, 444 (1995) (the likely damage resulting from suppressed impeachment evidence "is best understood by taking the word of the prosecutor"); *Smiley v. Thurmer*, 542 F.3d 574, 585–86 (7th Cir. 2008) (prosecutor's emphasis of an inadmissible statement showed that "the State itself believed that this evidence was critical in obtaining [petitioner's] conviction."); *Murillo v. Frank*, 402 F.3d 786, 793 (7th Cir. 2005) ("Why would the prosecutor have introduced Luis's statement, given the considerable risk even under [*Ohio v.*] *Roberts*, unless he expected it to have punch and doubted the sufficiency of other evidence?"); *Brown v. Keane*, 355 F.3d 82, 92 (2d Cir. 2004) (court cannot find improper admission of evidence harmless where it was important to the prosecution's case and the prosecutor stressed it at trial); *Yohn v. Love*, 76 F.3d 508, 523–24 (3d Cir. 1996) (same).

Finally, as a matter of common sense, a jury's request to re-hear improperly admitted testimony is a strong indication the testimony substantially affected the verdict. *See Vasquez v. Jones*, 496 F.3d 564, 576 (6th Cir. 2007) (jury's request to review testimony indicates it was important to their deliberations);

Fulcher v. Motley, 444 F.3d 791, 811 (6th Cir. 2006) ("[T]he most logical reason as to why the jury asked to rehear the tape of Ash's interview was that they did not consider Wright's direct testimony alone to be sufficient for a guilty verdict"); *Ryan v. Miller*, 303 F.3d 231, 255 (2d Cir. 2002) ("[T]he prosecutor's reference to the erroneous evidence in his closing and the jury's request for a read back compounds the prejudice."); *Wray v. Johnson*, 202 F.3d 515, 530 (2d Cir. 2000) (jury's request for a read-back significant in determination of prejudice).

B. The Ninth Circuit's Decision Conflicts With All of These Principles.

The Ninth Circuit incorrectly stated that it could grant relief "only if *petitioner* shows that the error had a 'a substantial and injurious effect or influence in determining the jury's verdict.'" Pet. App. 6a (emphasis added). The Ninth Circuit reversed the correct burden of persuasion, under which Respondent bore the risk of failing to show harmlessness. *O'Neal*, 513 U.S. at 435–40; *see United States v. Dominguez Benitez*, 542 U.S. 74, 82 n.7 (2004) (*Brecht's* application of the *Kotteakos* standard to collateral review assigns the government the burden of showing that constitutional trial error was harmless).

The Ninth Circuit held the constitutional violation in admitting Sgt. Sanford's testimony regarding his interview of Alexander was harmless because it was "one of several pieces of evidence the jury had before it that discredited Davis's self-defense theory." Pet. App. 6a–7a. This decision is erroneous because the standard for determining the harmlessness of a constitutional error is not whether other evidence supported the guilty verdict "[but] rather, even so, whether the error itself had substantial influence." *Kotteakos*, 328 U.S. at 765. Here, all factors pointed to harmfulness.

First, as to centrality to the case, the testimony recounted statements the *complaining witness* made to a domestic violence investigator describing the incident in which she was injured, and the testimony was by far the most detailed account of the events at issue. *Compare* Pet. App. 75a–80a, 88a–93a (Officer Salazar's direct examinations) *with* Pet. App. 130a–143a (Sgt. Sanford's direct examination). Moreover, the prosecution called Sgt. Sanford as a witness specifically to rebut the evidence of self-defense, and his testimony was the only such rebuttal evidence presented. *See* Pet. App. 127a (prosecutor arguing to trial court that Sgt. Sanford's interview is necessary to rebut the testimony of defense investigator Phillips). The error in admitting Sgt. Sanford's testimony thus went to the crux of the trial. As the prosecutor explained to the jury, self-defense was the only real issue because Davis did not dispute striking Alexander with a hammer. Pet. App. 170a.

The prosecutor's decision to introduce Sgt. Sanford's testimony demonstrates its importance to the State's case. Other than the exculpatory account provided by defense investigator Phillips and evidence that Alexander had a cut on her finger, Sgt. Sanford's testimony was the *only evidence* that Alexander had held a knife during the incident. The prosecutor nevertheless reopened his case to present Sgt. Sanford's testimony after the defense had rested, and elicited the admission about the knife, even though it partially corroborated Phillips' account.

Pet. App. 142a–143a. The most plausible explanation of the prosecutor's decision to introduce Sgt. Sanford's testimony, despite the potential damage from Alexander's admission, is the prosecutor believed the testimony was necessary to secure a conviction.

Second, the other evidence of guilt was far from overwhelming. Six witnesses testified at trial, with the testimony lasting only two and a half hours. All of the testimony about what happened during the events at issue was in the form of conflicting hearsay statements. As the prosecutor acknowledged to the jury, "You have conflicting stories on this. There is a lot of different accounts you've heard. *No two accounts are the same.*" Pet. App. 170a (emphasis added). Other than Sgt. Sanford's testimony, all of the hearsay statements introduced by the prosecution were fragmentary accounts related during a brief 911 call and by a police officer who responded to the scene of the incident and collected basic information from Alexander and Persons while dealing with a medical emergency. *See* Pet. App. 192a (prosecutor arguing to the jury that Officer Salazar did not have time to ask detailed questions).

Third, consistent with the critical importance of Sgt. Sanford's testimony in rebutting Davis's claim of self-defense, the prosecutor emphasized Alexander's statement to Sgt. Sanford during opening statements and especially in closing arguments. Among other things, the prosecutor mentioned *22 times* in closing arguments that Alexander was sitting down when she was struck, evidence that Sgt. Sanford provided. Pet. App. 170a–177a. In his opening statement and his closing argument, the prosecutor told the jury that after striking Alexander, Davis fled with the hammer and the telephone receiver, testimony that Sgt. Sanford provided. Pet. App. 74a, 151a, 193a.

Finally, the jury asked to re-hear Sgt. Sanford's testimony about his interview of Alexander not once, but *twice*. Pet. App. 194a–195a. The jury's notes demonstrate that the jurors relied on Sgt. Sanford's testimony in reaching their verdict.

The Ninth Circuit did not address any of these circumstances in its harmless error analysis, but instead pointed to "several pieces of evidence" that "discredited" Davis's claim of self-defense. Pet. App. 6a–7a. This evidence is inconclusive:

- Alexander's statement to Officer Salazar that Davis had said, "All right, bitch, I got something for you" told the jury nothing about the circumstances of the utterance (*i.e.*, whether Davis made the statement as he was defending himself). Moreover, Sgt. Sanford had earlier given a different version of the statement, reducing his credibility. Pet. App. 79a, 86a. The trial judge noted that this "makes someone wonder what exactly was the hearsay in this case, what we have by the testimony of Officer Salazar." ER 235. The prosecutor *acknowledged* this testimony was not detailed enough to rebut Davis's self-defense claim, and this was why the prosecutor introduced Alexander's statement to Sgt. Sanford. Pet. App. 125a, 127a.

- Persons' statement on the 911 recording that Davis "jumped" on Alexander and "busted" her head simply showed that

Davis hit Alexander with a hammer, a fact not in dispute. Thus, the quantum of evidence on this point is irrelevant to the prejudice analysis. The statement told the jury nothing about whether Alexander was wielding a knife when Davis "jumped" on her.

- Persons' statement to Officer Salazar that Davis pushed Alexander was unclear as to whether Alexander fell to the couch before or after being struck. *Compare* Pet. App. 92a–93a (fell before being struck) *with* Pet. App. 95a (fell after being struck). Persons' account was also suspect because the evidence suggested she was upstairs at the time of the incident and had not witnessed the events at issue. Pet. App. 115a–116a, 145a. Indeed, the prosecutor repeatedly used Sgt. Sanford's testimony that Alexander was sitting on the couch when Davis struck her to corroborate and strengthen Persons' account of Davis having pushed Alexander onto the couch.[4]

- Medical evidence that the hammer blow was "controlled" and delivered with "great force" told the jury nothing about whether Davis acted in self-defense. Dr. Gauger testified that he could not say what Alexander was doing with her arms before being hit. Pet. App. 160a–161a. The prosecutor presented Dr. Gauger's testimony specifically and exclusively rebut the suggestion that the hammer blow was an accident, caused by the hammer having "slipped." ER 279–81; *see* Pet. App. 116a, 118a–119a. This testimony went to the element of willfulness (Pet. App. 169a–170a) and had no bearing on the element of unlawfulness (*i.e.*, whether or not Davis acted in self-defense).

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[4] *See* Pet. App. 171a (arguing that Persons and Alexander both said Alexander was sitting down); Pet. App. 173a (arguing that neither Persons nor Alexander had motive to lie, and "they both say [Alexander] was sitting down when she was hit"); Pet. App. 174a ("[Alexander] had to be sitting down, just like she told Sergeant Sanford, just like Glory Persons told Officer Salazar."); Pet. App. 177a ("The witness Glory Persons has her sitting down. Ella [Alexander] even admits she was sitting down, even admitting conduct we wouldn't like.").

- Finally, the absence of evidence that Davis received defensive wounds is immaterial given that the prosecution had the burden of proof on this issue. ER 322–23 (court instructing jury that "[t]he burden is solely on the prosecution to prove beyond a reasonable doubt that the defendant did not act in self-defense in this case."). Moreover, that Alexander did not land a blow, and may not have intended to land a blow (Pet. App. 118a, 120a), does not show that Davis's use of force was unjustified.

Even if the evidence relied on by the Ninth Circuit were sufficient to convict Davis, that is not the correct standard. *See Kotteakos*, 328 U.S. at 764–65. The evidence does not come anywhere near to overcoming the plainly prejudicial impact of Sgt. Sanford's testimony that Davis did not act in self-defense, but struck the unarmed Alexander as she was sitting down.

The Ninth Circuit's decision leaves the following questions unanswered. Why did the prosecutor reopen his case after the defense had rested to present Sgt. Sanford's testimony despite Alexander's admission to him that she had held a knife? Why did the prosecutor repeatedly rely on Sgt. Sanford's testimony in closing arguments? Why did the jury ask for Sgt. Sanford's testimony to be re-read twice? The only plausible answer to these questions is that his testimony was crucial to the prosecution's case.

II. GIVEN THE OBVIOUS ERRONEOUSNESS OF THE NINTH CIRCUIT DECISION, SUMMARY REVERSAL IS WARRANTED.

Measured by any standard, the improper admission of Sgt. Sanford's testimony had a substantial and injurious effect on the jury's verdict. At an absolute minimum, the evidence as to harm is in equipoise, requiring a finding of prejudice. *See O'Neal*, 513 U.S. at 437. The judges on the Ninth Circuit panel may have concluded the error was harmless by relying on their own impressions of Davis's guilt. The judges may have believed that other evidence of guilt was sufficient to convict Davis, and therefore no substantial harm occurred. Both approaches are patently erroneous under *Kotteakos*, *Brecht*, and *O'Neal* and summary reversal is warranted. *See Olden v. Kentucky*, 488 U.S. 227, 232–33 (1988) (summarily reversing after finding Confrontation Clause violation harmful).

CONCLUSION

For the reasons set forth above, the petition should be granted and the judgment of the Ninth Circuit summarily reversed.

Respectfully submitted,

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September 2009

APPENDIX

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ANTHONY T. DAVIS, Petitioner - Appellant, v. D. L. RUNNELS, Respondent - Appellee.	No. 07-16601 D.C. No. CV-02-00538-PJH MEMORANDUM* **FILED MAY 20, 2009**

Appeal from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, District Judge, Presiding

Argued and Submitted January 14, 2009
San Francisco, California

Before: THOMAS and PAEZ, Circuit Judges, and EZRA, District Judge.

Davis appeals the district court's denial of his 28 U.S.C. § 2254 petition. We affirm. Because the parties are familiar with the factual and procedural history of this case, we need not recount it here. We review *de novo* the district court's decision to grant or deny a 28 U.S.C. § 2254 habeas petition. *McMurtrey v. Ryan*, 539 F.3d 1112, 1118 (9th Cir. 2008).

The critical issue on appeal is whether Davis is entitled to federal habeas relief on his claim that his rights under the Confrontation Clause were violated by the admission into evidence of an out-of-court statement made to a police officer by the victim of the crime. Under the AntiTerrorism and Effective Death Penalty Act ("AEDPA"), Davis can prevail on a claim "that was adjudicated on the merits in State court" only if he can show that the adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A state court decision is "contrary to" federal law if it "applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or "confronts a set of facts that are materially indistinguishable from" a Supreme Court case yet reaches a different result. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). A state court decision involves an "unreasonable application" of clearly established federal law "if it either 1) correctly identifies the governing rule but then applies it to a new set of facts in a way that is objectively unreasonable, or 2) extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable." *Bockting v. Bayer*, 505 F.3d 973, 977-78 (9th Cir. 2007) (citation and internal quotation marks omitted).

The parties do not dispute the "clearly established" legal principles applicable in this case. The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him." U.S.

Const., amend. VI. The Supreme Court has explained that the right of confrontation "means more than being allowed to confront the witness physically," but rather "[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974) (internal quotation marks and citation omitted; emphasis removed).

Crawford v. Washington, 541 U.S. 36 (2004), decided while this petition was pending on collateral review, does not apply to this case. *Whorton v. Bockting*, 549 U.S. 406, 421 (2007). Therefore, we apply pre-*Crawford* law and, in particular, the former "reliability" standard set forth in such cases as *Ohio v. Roberts*, 448 U.S. 56 (1980), *Idaho v. Wright*, 497 U.S. 805 (1990), and *Lilly v. Virginia*, 527 U.S. 116 (1999) (plurality opinion).

The pre-*Crawford* case law established that a declarant's out-of-court statement "'is admissible only if it bears adequate indicia of reliability.'" *Wright*, 497 U.S. at 814-15 (quoting *Roberts*, 448 U.S. at 66). Such reliability may be inferred without more where the evidence falls within "'a firmly rooted hearsay exception.'" *Id.* at 815 (quoting *Roberts*, 448 U.S. at 66). In the absence of such an established exception, however, the hearsay evidence is "'presumptively unreliable and inadmissible for Confrontation Clause purposes,'" *id.* at 818 (quoting *Lee v. Illinois*, 476 U.S. 530, 543 (1986)), and "'must be excluded, at least absent a showing of particularized guarantees of trustworthiness,'" *id.* (quoting *Roberts*, 448 U.S. at 66). "Because evidence possessing 'particularized guarantees of trustworthiness' must be at least as reliable as evidence admitted under a firmly rooted hearsay exception, . . . evidence admitted under the former requirement must similarly be so trustworthy that adversarial testing would add little to its reliability." *Id.* at 821 (citations omitted). At the same time, a presumptively unreliable statement may not be admitted "by bootstrapping on the trustworthiness of other evidence at trial." *Id.* at 823.

In undertaking this reliability inquiry, courts must consider "the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief." *Id.* at 820. Relevant factors in the reliability analysis may include consideration of the declarant's mental state, her lack of motive to fabricate, the consistency with which she repeats the statement, and the statement's spontaneity. *See id.* at 821-22 (approving the above factors as indicia of reliability in child sexual abuse cases).

In the instant case, the witness made the statement to a police officer at the hospital after the incident. The California Court of Appeal relied on several factors to support its conclusion that the witness's statement "possess[ed] sufficient indicia of trustworthiness and reliability to warrant its admission": (1) the witness had spent the intervening seven-hour period after the incident receiving medical treatment; (2) the witness was lying on a gurney and was being moved from the trauma unit when she gave her statement; (3) the witness had visible head trauma; (4) the witness had been drinking heavily immediately before the incident; and (5) the statement was tape recorded.

The Court of Appeal concluded that in light of these factors there was no reason to suspect that the witness was not telling the truth. But while the absence of fabrication may be necessary to satisfy the Sixth Amendment's reliability requirement, it is not sufficient; the Confrontation Clause protects not only against lies, but also against misperceptions and faulty memories. *See, e.g.*, *Roberts*, 448 U.S. at 70-71. The Court of Appeal reasoned that heavy drinking coupled with visible head trauma made the statement reliable. This rationale ignores the clearly established principle that an intoxicated declarant actually "militates against finding that [the witness's] statements were so inherently reliable that cross-examination would have been superfluous." *Lilly*, 527 U.S. at 139 (plurality opinion). Similarly, significant head trauma does not indicate an improvement in an individual's perception and memory, but rather signifies the opposite.

In addition, there were several inconsistencies in the witness's statement, and the state concedes that the witness's memory was (quite justifiably) hazy. Further, after giving the statement, the witness never stood by it. Instead, she repeatedly gave a different account of the attack, including while under oath.

Heavy drinking and severe head trauma are not factors upon which courts may rely as demonstrating that an out-of-court statement possessed "particularized guarantees of trustworthiness." The state court's contrary conclusion was an unreasonable application of clearly established federal law as determined by the Supreme Court.

The admission of the out-of-court declaration violated Davis's rights under the Confrontation Clause.

Even if a state court decision is "contrary to" or "involved an unreasonable application of" clearly established federal law, a habeas court may grant relief only if petitioner shows that the error had a "a substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). "If a habeas court is left with 'grave doubt' about whether a constitutional error substantially influenced the verdict, then the error was not harmless." *Parle v. Runnels*, 387 F.3d 1030, 1044 (9th Cir. 2004) (citing *O'Neal v. McAninch*, 513 U.S. 432, 438 (1995)). In making this inquiry, the court must review the record to determine "what effect the error had or reasonably may be taken to have had upon the jury's decision." *McKinney v. Rees*, 993 F.2d 1378, 1385-86 (9th Cir. 1993) (quoting *Kotteakos*, 328 U.S. at 764).

Here, the witness's statement in the hospital was one of several pieces of evidence the jury had before it that discredited Davis's self-defense theory. The victim told police officers at the scene that Davis had told her "All right bitch, I got something for you" before striking her with a hammer.[1] Moreover, during the 9-1-1 call the victim's mother told the dispatcher that Davis had "jumped" on the victim and "busted" her in the head with a hammer. The mother also told police that Davis had pushed the victim onto a couch before striking her with a hammer. The medical evidence showed that the blow was delivered with great force, fracturing the victim's skull. There was no evidence of defensive wounds. In light of this evidence, along with expert testimony that the victim's injuries were the result of a "controlled" blow, we have no "grave doubt" regarding whether the constitutional error of allowing the witness's statements at the hospital substantially influenced the verdict. Therefore, we conclude that the constitutional error was harmless within the standards applicable to federal habeas review.

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[1] We see nothing contrary to, or an unreasonable application of, clearly established federal law in Davis's assignments of error related to these additional statements. We also deny Davis's motion to expand the record on appeal.

AFFIRMED.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ANTHONY T. DAVIS, Petitioner, v. D.L. RUNNELS, Warden, High Desert State Prison, Respondent.	No. C 02-0538 PJH **ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS** **FILED AUG. 2, 2007**

Before the court is the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, filed pro se by state prisoner, Anthony T. Davis ("Davis"), who is now represented by counsel. Having reviewed the parties' papers, the record, and having carefully considered their arguments and the relevant legal authorities, the court hereby DENIES the petition.

BACKGROUND

I. Procedural History

On July 16, 1998, Davis was convicted by a jury of one count of assault with a deadly weapon under California Penal Code § 245, subdivision (a)(1), with great bodily injury under California Penal Code § 12022.7, subdivision (a), resulting from a violent altercation with his girlfriend. Subsequently, on July 20, 1998, the state trial court found that Davis had two prior convictions qualifying as "strike" priors within the meaning of Penal Code §§ 667, subdivisions (d)-(e) and 1170.12, subdivisions (b)-(c).

On October 9, 1998, the state trial court denied Davis' motion for a new trial. Davis then retained a new attorney and filed a second motion for a new trial based on ineffective assistance of counsel. On December 23, 1998, the trial court denied Davis' second motion. Thereafter, on January 11, 1999, the court sentenced Davis to a total prison term of 38 years to life under California's three strikes law (Ca. Pen. Code § 667, subd. (b)-(i)).

On November 13, 2000, the California Court of Appeal affirmed Davis' conviction in an unpublished decision. Davis filed a petition for review in the California Supreme Court on December 22, 2000, which the court summarily denied on February 21, 2001. Davis filed the instant federal habeas petition on January 30, 2002.

II. Factual History

Davis' conviction stems from the following facts, a more extensive summary of which may be found in the state appellate court's decision. See Exh. F.

On February 1, 1998, at approximately 3:00 a.m., Davis struck his girlfriend (now wife), Ella Alexander ("Alexander"), with a hammer on the top right side of her head, resulting in a depressed skull fracture. At trial, Davis admitted to inflicting the injury. However, the circumstances surrounding the injury were at issue for the jury—specifically, whether Davis acted as the aggressor or whether the injury was inflicted by accident or in self-defense.

No one present at the time of the incident testified at trial. The victim, Alexander, was subpoenaed on several occasions, but refused to testify. The victim's mother, Gloria Persons ("Persons"), the only other person present at the time of the incident, also did not testify at trial.

However, the jury heard evidence regarding numerous conflicting out-of-court statements made by both Alexander and her mother, Persons, at different points in time to various people, including law enforcement officers, regarding the events surrounding the altercation. These included Officer Salazar, who testified that, upon arriving at the scene, Alexander, who was fading in and out of consciousness, stated that her boyfriend, Davis, had struck her with a hammer. She further stated that before Davis hit her, he made the comment, "All right, Bitch, I got something for you."

Alexander's mother, Gloria Persons, who was present at the residence when the incident occurred, reported to police immediately after the incident that she was upstairs when she heard Davis and Alexander arguing. Persons then heard a slap and heard her daughter cry out for her to call the police. Persons went downstairs, where she saw Davis and Alexander arguing. Persons tried to separate them. Persons then witnessed Davis push Alexander onto the couch and hit her in the head with a hammer. Persons called 911, and attempted to stop the bleeding from Alexander's head.

The morning following the incident, while at the hospital, Alexander stated in a tape-recorded interview to another officer, Sergeant Sanford, that she had been arguing with Davis. She asserted that she had a knife that she intended to use to scare Davis, and that she pulled the knife on Davis before she saw the hammer. According to Alexander, immediately after Davis inflicted the blow with the hammer, he stated, "Oh my God," and ran out of the house.

Shortly before Davis' trial commenced, Alexander gave a conflicting statement to defense investigator Nigel Phillips, in an effort to exonerate Davis. At trial, Phillips testified that Alexander stated that: (1) after consuming a large quantity of alcohol, she and Davis got into an argument; (2) at one point, she went into the kitchen and got three knives; (3) when the argument resumed, she used the knives, one in each hand, to slash at Davis' face and neck; (4) Davis grabbed a hammer and tried to defend himself by using it to knock the knives out of her hands; and (5) during the ensuing melee, the hammer then accidently slipped and hit her on the head.

In addition, the jury heard evidence that several months following the incident, Alexander called the District Attorney's Office and indicated that she wanted to drop the charges against Davis, claiming that the incident had been a drunken accident. She refused to provide further details.

The prosecution presented testimony from Dr. Grant Gauger, acting chief of neurosurgery at San Francisco General Hospital and associate clinical professor at the University of California, to dispel the possibility that the injury was an accident. Gauger testified that a controlled, guided blow with considerable force is required to break the skull, and such an injury would unlikely result from a hammer "slipping" from someone's hand. The prosecution further undercut Davis' self-defense claim, arguing that given Alexander's physical size of five feet ten inches tall and 225 pounds, and given the fact that the injury was inflicted at the very top of her skull, she would have had to have been sitting down at the time of the injury.

ISSUES

In his petition before this court, Davis alleges the following violations of his constitutional rights, four of which concern alleged violations of the Sixth Amendment's Confrontation Clause:

(1) That he received ineffective assistance of counsel when his court-appointed attorney failed to investigate evidence that Davis' hand was allegedly cut by Alexander in support of his self-defense theory; and

(2) California Evidence Code § 1370 is facially unconstitutional and violates the Confrontation Clause of the Sixth Amendment;

(3) application of California Evidence Code § 1370 to Davis violated the Confrontation Clause;

(4) the Confrontation Clause was violated when Persons' and Alexander's hearsay statements to Officer Salazar were admitted as spontaneous statements;

(5) the Confrontation clause was violated when the state trial court denied Davis' motion for a new trial, based on "newly discovered" evidence that demonstrated that Alexander and Persons contrived to misrepresent the incident in order to protect Alexander from criminal charges;

(6) that the alleged cumulative errors denied him a fair trial.

A. Further Exhaustion Proceedings

As noted, Davis filed his pro se federal habeas petition on January 30, 2002. On August 13, 2002, the court denied Davis' request to appoint counsel, finding that because Davis' claims were not particularly complex and because he had presented them adequately in his petition, appointment of counsel was not warranted under 18 U.S.C. § 3006A(a)(2)(B). The state subsequently filed an opposition and Davis a traverse, and the instant federal habeas petition was fully briefed on November 15, 2002.

However, on March 8, 2004, prior to the court's issuance of a decision on the merits, the United States Supreme Court decided *Crawford v. Washington*, 541 U.S. 36 (2004). The Crawford Court held that the Confrontation Clause forbids admission in a criminal trial of an out-of-court testimonial statement by a witness who does not testify, unless the witness is both unavailable and the defendant had a prior opportunity to cross-examine, abrogating the "reliability" test set forth previously by the Court in *Ohio v. Roberts*, 448 U.S. 56, 65 (1980). *Crawford*, 541 U.S. at 68-69. Thereafter, on April 19, 2004, the court appointed counsel in this case for the limited purpose of providing supplemental briefing on both the retroactivity of *Crawford*, and its potential effect on Davis' Confrontation Clause claims. Federal Public Defender David Fermino was appointed as Davis' counsel. The parties completed supplemental briefing on the Crawford issues on August 19, 2004. However, as the court noted in a subsequent order issued March 8, 2005, the parties' briefing primarily covered the issue of *Crawford*s retroactivity, as opposed to the merits of Davis' claims under *Crawford.*

Subsequently, though, on February 22, 2005, the Ninth Circuit decided *Bockting v. Bayer*, 399 F.3d 1010 (9th Cir. 2005), and concluded that Crawford applied retroactively to cases on collateral review. Following the Ninth Circuit's decision, on March 8, 2005, this court held the instant habeas proceedings in abeyance in order to afford the state courts the opportunity to re-examine Davis' Confrontation Clause claims in light of the Supreme Court's decision in *Crawford*, and the Ninth Circuit's decision in *Bockting* that *Crawford* should be applied retroactively to the instant case.

Based primarily on former appointed counsel's failure to timely file a habeas petition on Davis' behalf in the state courts, on November 1, 2005, this court vacated Mr. Fermino's appointment, and appointed Davis' current counsel, Michael Thorman. Thorman thereafter sought habeas relief on Davis' behalf in the state courts. He filed a state habeas petition with the superior court on December 22, 2005, which the court subsequently denied. Davis then sought habeas relief in the California Supreme Court, which, in a postcard denial, denied review on March 14, 2007. On March 27, 2007, Davis advised this court of the final state court decision. The court subsequently ordered the parties to show cause why the matter should not be finally adjudicated.

On April 6, 2007, Davis, responding to the court's OSC, sought leave to have counsel supplement the original briefing on his claims. On April 9, 2007, the court ruled that supplemental briefing was neither helpful nor necessary, noting the United States

Supreme Court's recent decision in *Whorton v. Bockting*, 127 S.Ct. 1173 (Feb. 28, 2007), in which the Court held that *Crawford* does not apply retroactively. Accordingly, the court noted that because Davis' Confrontation Clause claims are therefore governed by *Ohio v. Roberts*, 448 U.S. 56, 65 (1980), a case in effect at the time of the prior completion of briefing, further briefing would be of no assistance. *See Bolton v. Knowles*, 2007 WL 793200 at *1 (9th Cir. 2007) (noting that habeas petitioner's Confrontation Clause claim is governed by the standards set forth in *Ohio v. Roberts*); *accord Miller v. Fleming*, 2007 WL 840981 (9th Cir. 2007).

STANDARD OF REVIEW

This court may entertain a petition for writ of habeas corpus "on behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Because the petition in this case was filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the provisions of that act apply here. *See Lindh v. Murphy*, 521 U.S. 320, 327 (1997). Under the AEDPA, a district court may not grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254 (d).

A state court decision is "contrary to" Supreme Court authority, falling within the first clause of § 2254(d)(1), only if "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decided a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-413 (2000). "Clearly established Federal law" under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). This "clearly established" law "refers to the holdings, as opposed to the dicta, of [Supreme] Court decisions as of the time of the relevant state court decision." *Id.*

"Under the 'unreasonable application' clause" of § 2254(d)(1), a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 1174. However, this standard "requires the state court decision to be more than incorrect or erroneous." *Id.* For the federal court to grant habeas relief, the state court's application of the Supreme Court authority must be "objectively unreasonable." *Id.* at 1174-1175. The "objectively unreasonable" standard is different from the "clear error" standard in that "the gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness." *Id.* at 1175; *see also Clark v.*

Murphy, 331 F.3d 1062, 1068 (9th Cir. 2003). Therefore, "[i]t is not enough that a habeas court, in its independent review of the legal question, is left with a firm conviction that the state court was erroneous . . . Rather, the habeas court must conclude that the state court's application of federal law was objectively unreasonable." *Andrade*, 538 U.S. at 75; *see also Clark*, 331 F.3d at 1068.

As for state court findings of fact, under § 2254(d)(2), a federal court may not grant a habeas petition by a state prisoner unless the adjudication of a claim on the merits by a state court resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(2). The "clearly erroneous" standard of unreasonableness that applies in determining the "unreasonable application" of federal law under § 2254(d)(1) also applies in determining the "unreasonable determination of facts in light of the evidence" under § 2254(d)(2). See *Torres v . Prunty*, 223 F.3d 1103, 1107-1108 (9th Cir. 2000). To grant relief under 2254(d)(2), a federal court must be "left with a firm conviction that the determination made by the state court was wrong and that the one [petitioner] urges was correct." *Id.* at 1108.

However, when the state court decision does not articulate the rationale for its determination or does not analyze the claim under federal constitutional law, a review of that court's application of clearly established federal law is not possible. *See Delgado v. Lewis*, 223 F.3d 976, 981-82 (9th Cir. 2000); *see also* 2 J. Liebman & R. Hertz, Federal Habeas Corpus Practice and Procedure § 32.2, at 1424-1426 & nn. 7-

10 (4th ed. 2001). When confronted with such a decision, a federal court must conduct an independent review of the record and the relevant federal law to determine whether the state court's decision was "contrary to, or involved an unreasonable application of, "clearly established federal law." *Delgado*, 223 F.3d at 982.

> When a state court does not furnish a basis for its reasoning, we have no basis other than the record for knowing whether the state court correctly identified the governing legal principle or was extending the principle into anew context. . . .[A]lthough we cannot undertake our review by analyzing the basis for the state court's decision, we can view it through the 'objectively reasonable' lens ground by *Williams* [, 529 U.S. 362]. . . . Federal habeas review is not de novo when the state court does not supply reasoning for its decision, but an independent review of the record is required to determine whether the state court clearly erred in its application of controlling federal law. . . . Only by that examination may we determine whether the state court's decision was objectively reasonable.

Id.

DISCUSSION

I. Davis was not Denied Effective Assistance of Counsel

Davis asserts that he was denied effective assistance of counsel based on his counsel's alleged failure to investigate evidence that his hand was cut by Alexander during the incident at issue, in support of his self-defense claim.

On December 23, 1998, the state trial court heard Davis' second motion for a new trial, based on the same ineffective assistance of counsel claim. In the trial court, Davis claimed that his former trial counsel, Mr. Leland Davis ("counsel"): (1) failed to investigate the victim, Alexander's propensity for violence; (2) failed to investigate a cut on Davis' hand allegedly inflicted by Alexander; and (3) failed to object during the prosecutor's allegedly improper closing argument. In the instant habeas petition, as in his state court appeal, Davis claimed ineffective assistance of counsel solely on the basis that his counsel failed to investigate the cut on Davis' hand allegedly inflicted by Alexander. Accordingly, this court limits its discussion to that issue.

At the December 23, 1998 hearing before the trial court, Davis testified that he had informed his attorney that Alexander inflicted a cut to his hand during the altercation. Davis further asserted that he informed his attorney that several people observed the cut, including his mother, Yvonne McGregor; his aunt, Drucilla Davis; his grandmother; his cousin, Thomas Redwood; and his cousin's girlfriend, Rachelle Martin. According to Davis, his attorney did not inquire further regarding the cut; nor did counsel inquire regarding the existence of related medical records. Davis contended that his counsel merely informed him that he had been in contact with Davis' family members.

Davis also testified that his attorney did not request the identities of non-family members who may have observed the cut; as a result, Davis explained that he did not volunteer the information. Davis contended that he assumed the cut was not relevant since his attorney did not question him about it. Davis, however, conceded that he had in fact signed a declaration affirming that, at the time of trial, his attorney asked him if there were any witnesses he wanted to call, and that he had responded that there were none.

Several people testified on Davis' behalf at the hearing on the motion for a new trial, including Davis' cousin, Redwood; his cousin's girlfriend, Martin; his aunt, Drucilla Davis and Alexander.[1] Redwood testified that Davis had been present at his house in February 1998, and had a cut on the palm of his right hand by his thumb for which Redwood gave Davis a bandage. Redwood testified that Davis' attorney never contacted him.

Redwood's girlfriend, Martin, likewise testified that she observed a cut on Davis' hand. She stated that Davis requested a bandage on two separate occasions, which she believed to have been approximately one or two days after Alexander was hit on the head. Martin testified that she was unsure where on Davis' hand the cut was located, but believed it was inside or around Davis' finger or palm area.

Drucilla Davis, Davis' aunt, also testified that she saw Davis in February soon after the incident, at which time he had a cut on his palm. She asserted that she was not contacted by Davis' attorney or anyone in his office.

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[1] Davis' mother, McGregor, and his sister, Carla Minnick, also testified at the hearing regarding the additional ineffective assistance claims made by Davis. A discussion of their testimony is not discussed here as the claims were not included in the federal habeas petition.

The victim, Alexander, testified at the hearing that prior to Davis' trial, Davis' attorney and a woman named Silver Jones interviewed her regarding the incident. Alexander claimed to have stated at that interview that, on the night of the incident, she was in possession of multiple knives with which she "went after" Davis. She also allegedly stated to counsel and Jones that she picked up the knives because she and Davis were arguing and she was intoxicated. Alexander believed that she cut Davis on the hand, but did not actually see the cut. Alexander further testified that she had substantial contact with Davis' attorney, but that he did not ask her to testify at trial, and that he, in fact, advised her that if she came to trial, she would be taken to jail.

Davis' counsel, Leland Davis, also testified at the hearing. Counsel testified that he spoke to Davis over the phone and in person a total of thirty times, and that he paid very close attention to Davis' case because it was a three strikes case. Counsel attested that in response to Davis' repeated mention of the cut on his hand, he made several inquiries as to whether Davis had, at the time, sought medical attention, shown the cut to anyone, or taken pictures of the cut. According to counsel, Davis responded to these inquiries negatively, asserting that there were no witnesses. Counsel also testified that, in spite of very open conversations, Davis made no mention of Drucilla Davis, Martin, or Redwood. Counsel further stated that no one contacted him before or after the trial with information; nor did Davis ask him to contact anyone else.

Finally, counsel denied instructing Alexander to ignore the prosecution's subpoena and not to testify, but, instead, testified that he advised her to contact the prosecutor. He stated that he made a tactical decision not to subpoena Alexander because he did not believe she would be a credible witness, and he feared negative information that could be revealed on cross-examination, such as her propensity for lying and history of drinking and violence.

The trial court subsequently denied Davis' second motion for a new trial, finding that counsel was not ineffective and had adequately presented Davis' self-defense claim to the jury. The trial court also found that: (1) the only names of potential witnesses that Davis gave counsel were those of his mother and sister; (2) counsel contacted and interviewed those potential witnesses; and (3) counsel inquired fully on the question of Davis' alleged cut.

The state appellate court affirmed the trial court's denial of Davis' second motion for a new trial and its conclusion that counsel was not ineffective. The California Court of Appeal deferred to the trial court's findings that: "[T]here [was] direct evidence that [counsel] inquired fully on the question of the cut, the witnesses to it," and that Davis did not provide counsel with the name of additional witnesses until "after the conviction by the jury." The state appellate court concluded that "the record reveal[ed] [Davis'] claim of self-defense was investigated, and presented in an effective manner."

A claim of ineffective assistance of counsel is cognizable as a claim for denial of the Sixth

Amendment right to counsel, which guarantees not only assistance, but effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The benchmark for judging any such claim must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. *Id.*

In order to prevail on a Sixth Amendment ineffective assistance of counsel claim, Davis must establish two things. First, he must establish that counsel's performance was deficient, i.e., that it fell below an "objective standard of reasonableness" under prevailing professional norms. *Strickland*, 466 U.S. at 687-88. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *See Strickland*, 466 U.S. at 687. Second, Davis must establish that he was prejudiced by counsel's deficient performance, i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Davis must show that counsel's errors were so serious as to deprive him of a fair trial. *Strickland*, 466 U.S. at 688. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Davis challenges his trial counsel's alleged failure to investigate adequately and present potential defense witnesses with respect to his self-defense claim. "A lawyer who fails adequately to investigate, and to introduce into evidence, records that demonstrate his client's factual innocence, or that raise sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance." *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999).

Federal law is clear that the duty to investigate and prepare a defense does not require that every conceivable witness be interviewed. *Hendricks v. Calderon*, 70 F.3d 1032, 1040 (9th Cir. 1995). A claim of failure to interview a witness cannot establish ineffective assistance when the person's account is otherwise fairly known to defense counsel. *Eggleston v. United States*, 798 F.2d 374, 376 (9th Cir. 1986). When the record shows that the lawyer was well-informed and the defendant fails to state what additional information would be gained by the discovery he now claims was necessary, an ineffective assistance claim fails. *Id.* A defendant's mere speculation that a witness might have given helpful information if interviewed is not enough to establish ineffective assistance. *See Bragg v. Galaza*, 242 F.3d 1082, 1087 (9th Cir. 2001).

Counsel's decision not to present evidence regarding Davis' cut constituted a reasonable tactical decision. The state court reasonably found, based on the evidence before it, that counsel "made a decision consistent with the *Strickland* case, that the consequences of presenting . . . the conduct of [Alexander] would open the door [under state evidentiary rules]." The state court further noted that counsel

> was very much concerned about that and its consequences. And it seems objectively appropriate for a lawyer with experience to be concerned about that consequence in a case such as this, where self-defense was involved.

R.T. 602. The state court concluded that it found "no need to second-guess the appropriateness of [counsel's] choices under the evidence that is before this court." *Id.*

This ruling comports with federal law. The relevant inquiry is not what defense counsel could have done, but whether the choices defense counsel made were reasonable. *See Babbitt v. Calderon*, 151 F.3d 1170, 1173 (9th Cir. 1998). A difference of opinion as to trial tactics does not constitute denial of effective assistance, *see United States v. Mayo*, 646 F.2d 369, 375 (9th Cir. 1981), and tactical decisions do not constitute ineffective assistance simply because in retrospect better tactics are known to have been available. *See Bashor v. Risley*, 730 F.2d 1228, 1241 (9th Cir. 1984); *see also Brodit v. Cambra*, 350 F.3d 985, 994 (9th Cir. 2003) (state court reasonably concluded that trial attorney provided effective assistance of counsel where attorney declined to present evidence favorable to defense out of concern that it would open door to unfavorable evidence).

Here, the record demonstrates that counsel's tactical decisions deserve deference because: (1) counsel based his trial conduct on strategic considerations; (2) counsel made an informed decision based upon investigation; and (3) the decision appears reasonable under the circumstances. *See Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994). Accordingly, this court concludes that the state appellate court's affirmance of the trial court's determination regarding ineffective assistance was not unreasonable.

Moreover, Davis is likewise unable to demonstrate prejudice. "[I]neffective assistance claims based on a duty to investigate must be considered in light of the strength of the [State's] case." *Eggleston*, 798 F.2d at 376. Davis is unable to establish that there is a reasonable probability that but for counsel's failure to investigate and present evidence from other witnesses, the result of the trial would have been different. *See Strickland*, 466 U.S. at 694. Based on the record before it, this court concludes that the trial court correctly found, and the state appellate court reasonably affirmed, that "the defense of self-defense was presented to the jury" and "was argued vigorously by [Davis'] lawyer." R.T. 600. Counsel's arguments and the jury instructions "provide[d] a full legal narrative of the contours of [Davis'] self-defense claim." *Id.*

Accordingly, Davis' ineffective assistance claim fails.

II. Confrontation Clause Claims

As set forth above, Davis also raises four claims related to alleged violations of the Sixth Amendment's Confrontation Clause. These claims relate to the state trial court's admission of out-of-court statements from the victim, Alexander, and her mother, Gloria Persons.

A. Legal Standards

The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. In *Ohio v. Roberts*, the Supreme Court set forth a general framework by which to determine whether admission of hearsay statements meets the requirements of the Confrontation Clause. 448 U.S. at 66. Under the *Roberts* framework, a hearsay statement is admissible if the prosecution shows that the declarant is unavailable and that the statement has adequate "indicia of reliability." *Id.* However, subsequently in *White v. Illinois*, the Supreme Court held that unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding. 502 U.S. 346, 354 (1992) (citing *United States v. Inadi*, 475 U.S. 387, 392-94 (1986)) (concluding that "*Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable"); *accord Whelchel v. Washington*, 232 F.3d 1197, 1208 (9th Cir. 2000).

"Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception," or if the evidence contains "particularized guarantees of trustworthiness." *Id.* "The 'particularized guarantees of trustworthiness' required for admission under the Confrontation Clause must . . . be drawn from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief." *Idaho v. Wright*, 497 U.S. 805, 820 (1990).

As noted, after this case was fully briefed, the United States Supreme Court held that the Confrontation Clause forbids admission in a criminal trial of an out-of-court testimonial statement by a witness who does not testify, unless the witness is both unavailable and the defendant had a prior opportunity to cross-examine her. *Crawford*, 541 U.S. at 68-69. However, the Supreme Court subsequently clarified that Crawford does not apply retroactively to this habeas case. *Whorton v. Bockting*, 127 S.Ct. at 1173.

B. General Background re: Confrontation Clause Claims

Alexander gave two separate statements to officers soon after the incident that were admitted by the trial court. The first statement was made to Officer Salazar, who responded to the 911 call the morning of the incident. Upon arriving at Alexander's apartment, Officer Salazar observed Alexander lying face-down in a pool of blood. When he questioned her regarding what happened, Alexander told Salazar that her boyfriend, Davis, hit her in the head with a hammer. The trial court admitted Alexander's first out-of-court statement under the spontaneous declaration exception to the state hearsay rule. *See* Cal. Evid. Code § 1240.

Alexander gave the second out-of-court statement admitted into evidence the morning after the incident, when she was in the hospital. In the course of an interview with Officer Sanford, Alexander stated again that Davis hit her over the head with a hammer. The trial court allowed the prosecution to introduce the second statement in rebuttal to defense testimony suggesting that the incident was an accident pursuant to California Evidence Code § 1370.

The trial court also admitted two out-of-court statements made by Alexander's mother, Persons, as spontaneous declarations pursuant to California Evidence Code § 1240. These statements included the tape of Person's 911 call, and her statements at the scene to Salazar.

C. California Evidence Code Section 1370 Claims

Davis challenges California Evidence Code § 1370, pursuant to which Alexander's statement to Sanford was admitted, on two grounds. First, he contends that the section is facially unconstitutional. Second, he claims that § 1370, as applied by the trial court, was unconstitutional.

i. Background

On July 9, 1998, more than five months after the incident, defense investigator Nigel Phillips interviewed Alexander by telephone. Phillips testified at trial that, at the time of the telephone interview, Alexander asserted that she wanted to change her prior story regarding the circumstances surrounding the February 1, 1998 incident. R.T. 57. Alexander told Phillips that on the day in question, she and Davis had an argument after they had both been consuming large amounts of alcohol. In the midst of the argument, Davis went upstairs, and Alexander went into the kitchen and obtained three knives, two of which she placed in her belt loops, and one in her socks. *Id.* at 58.

The argument resumed when Davis returned downstairs, and Alexander alleged that she began thrashing the knives at Davis' face and neck. Alexander asserted that, at the time she began thrashing the knives, Davis had nothing in his hands. *Id.* at 58-59. Phillips testified that Alexander stated that Davis then grabbed a hammer in an attempt to defend himself and to knock the knives from Alexander's hands. *Id.* In the melee, Alexander claimed that the hammer slipped and hit her on the head, causing her injury.

Following Phillips' testimony regarding Alexander's later statements, the trial court permitted testimony from San Francisco Police Sergeant John Sanford, Jr. based on his tape-recorded interview with Alexander the morning after the incident while she was at the hospital. The court allowed introduction of Alexander's statement to Sanford to rebut her statements to Phillips, pursuant to California Evidence Code § 1370, which provides in pertinent part:

> § 1370 Infliction of Injury
>
> (a) Evidence of a statement by a declarant is not made inadmissible by the hearsay rule if all of the following conditions are met:
>
> > (1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.
> >
> > (2) The declarant is unavailable as a witness pursuant to Section 240.
> >
> > (3) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of statements made more than five years before the filing of the current action or proceeding shall be inadmissible under this section.
> >
> > (4) The statement was made under circumstances that would indicate its trustworthiness.
> >
> > (5) The statement was made in writing, was electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official.

(b) For purposes of paragraph (4) of subdivision (a), circumstances relevant to the issue of trustworthiness include, but are not limited to, the following:

(1) Whether the statement was made in contemplation of pending or anticipated litigation in which declarant was interested.

(2) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.

(3) Whether the statement is corroborated by evidence other than statements that are admissible only pursuant to this section.

Sanford testified that Alexander told him that she received the injury when Davis hit her over the head with a hammer earlier that morning. She stated that she and Davis had been drinking that night and that they were arguing in the living room prior to her injury. She told Sanford that Davis would not leave her alone, even though she continued to ask him to do so. According to Alexander, Davis went upstairs and returned with a hammer. R.T. 113. He advised Alexander that he was tired of her "clowning him," and advised Alexander, while holding the hammer, that "before I leave, I'm going to do something else." R.T. 115.

In her statement to Sanford, Alexander acknowledged that at some point she did have a knife "[j]ust to scare him because I know he was . . . gonna . . . get in my face." R.T. 117-18. She admitted pulling the knife on Davis prior to seeing the hammer. *Id.* According to Alexander, Davis reached for a cigarette, and she slapped it out of his hand. Sanford recalled Alexander telling him she was sitting on the couch when she was hit with the hammer. After Davis hit Alexander, he said, "Oh, my God," and ran out of the house. According to Alexander, her mother was upstairs at the time of the assault.

ii. Facial Constitutionality

Davis argues that section 1370 is unconstitutional on its face because it violates the Confrontation Clause of the Sixth Amendment.

Section 1370 was enacted in 1996 in response to the exclusion of Nicole Brown Simpson's diary in the O.J. Simpson trial in 1994-95. It permits the admission of a hearsay statement pertaining to the infliction of physical injury on the declarant if the declarant is unavailable as a witness and the statement was made under circumstances that guarantee its trustworthiness.

The state appellate court concluded that section 1370 was facially constitutional based on a pre-*Crawford* California Court of Appeal decision, *People v. Hernandez. See* 71 Cal.App.4th 417, 424 (Cal. Ct. App. 1999). Because the court agreed that section 1370 was "closely akin to the 'firmly rooted' Evidence Code section 1240 'spontaneous statement' hearsay exception," and "contains particularized guarantees of trustworthiness and adequate indicia of reliability," the California Court of Appeal concluded that section 1370 was not facially unconstitutional. *See id.*

Here, because Davis' Confrontation Clause claims are governed by the federal law in effect prior to *Crawford,* the court must evaluate the constitutionality of section 1240 under pre-*Crawford* law.[2] The court concludes that the state appellate court's decision was reasonable because the evidence admissible under the statute contains sufficient "indicia of reliability," as determined by applicable federal law. First, the statute recognizes the admissibility of evidence similar to that deemed admissible by the excited utterance, and statements to obtain medical treatment or diagnosis, exceptions to the hearsay rule, *see* Federal Rules of Evidence 803(2) and 803(4), both of which the Supreme Court has suggested are "firmly rooted" exceptions. *See White*, 502 U.S. at 355-56 & n. 8 (noting that spontaneous declarations "are made in contexts that provide substantial guarantees of their trustworthiness" and also that "[a] statement that has been offered in the moment of excitement - without the opportunity to reflect on the consequences of one's exclamation - may justifiably carry more weight"); *see also People of the Territory of Guam v. Cepeda*, 69 F.3d 369, 373 (9th Cir. 1995) (noting that excited utterance hearsay exception is "firmly rooted" for purposes of the Confrontation Clause).

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[2] The Supreme Court's decision in *Crawford* called into question the continued validity of the pertinent reasoning in the *Hernandez* decision, relied on by the state appellate court. *See People v. Kilday*, 20 Cal.Rptr.3d 161, 168-69 (Cal.Ct.App. 2004) (without deciding issue, noting that *Crawford* requires a different analysis regarding the facial constitutionality of statute than that utilized by court in *Hernandez*, which relied on *Roberts*). However, post-*Crawford*, the California courts have held that: "Construing section 1370 of the Evidence Code along with *Crawford*, we interpret the trustworthiness prong of subdivision (a)(4) of that statute to require a prior opportunity to cross-examine the declarant." *See, e.g., People v. Price*, 15 Cal.Rptr.3d 229, 238-39 (Cal. Ct. App. 2004).

Additionally, section 1370 contains several provisions designed to provide "particularized guarantees of trustworthiness." First, the statute requires that the statement concern the personal injury of the declarant, thus ensuring that it is within the personal knowledge of the declarant. *See People v. Kons*, 133 Cal.Rptr.2d 520, 525 (Cal. Ct. App. 2003). Second, the timing provision of the statute requires that the statement be made at or near the time of the trauma or threat of infliction, which increases the statement's reliability by reducing the time for reflection. *Id.* Furthermore, the fact that the statement must be made in writing and/or recorded electronically only to medical personnel or law enforcement also encourages the declarant to speak truthfully "on the record." *Id.* Finally, the statute also specifically requires that the statement be made under trustworthy circumstances, and delineates several examples of such circumstances. *Id.*

For these reasons, Davis' claim fails.

iii. Constitutionality as Applied

Davis also contends the trial court applied section 1370 unconstitutionally to him by admitting Alexander's statements. He claims that the trial court improperly found that Alexander was unavailable and erred in finding that her statements were made under circumstances that guaranteed trustworthiness.

a. Unavailability

As noted above, because Alexander's statements that were admitted pursuant to section 1370 were not made in the course of a prior judicial proceeding, unavailability analysis is not a necessary part of the

Confrontation Clause inquiry with respect to this issue. *See White*, 502 U.S. at 741 (noting that "*Roberts* stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding"). Nevertheless, even if unavailability was at issue, the court would conclude that the state appellate court's determination that Alexander was unavailable was reasonable.

Alexander was served with a subpoena for the original trial date by an investigator for the district attorney's office. Subsequently, on June 17, 1998, assistant district attorney Anthony Brass personally served Alexander with a second subpoena for the same trial date. Thereafter, on June 26, 1998, Alexander was arrested at her residence, the same residence where the incident occurred, on a body attachment, which the district attorney sought and obtained because Alexander had previously indicated that she did not want to prosecute the case. The district attorney authorized her release based on Alexander's promise to appear at trial. She failed to appear on the date set for trial.

In addition to these efforts, the district attorney also attempted to compel Alexander's appearance by conducting "checks" on her residence. He had investigators personally check her residence on nearly a dozen occasions, and telephoned her regularly until her phone was disconnected.

Davis, however, contends that there was an insufficient showing of diligence on the state's part to secure Alexander's attendance at trial, and therefore the state court's determination that Alexander was unavailable was unreasonable.

The state appellate court affirmed the trial court's determination that Alexander was unavailable based on the state evidence code and California case law. California Evidence Code § 240 defines an "unavailable" witness as one who is "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." *See § 240* (a)(5). The California Court of Appeal then noted that there was a split among the state appellate courts regarding the appropriate standard of review for a trial court's determination of unavailability. Applying both standards, including an abuse of discretion and an independent review standard, the state appellate court affirmed. It concluded that, "looking at the totality of the circumstances, it is reasonable to believe further efforts would not have led to Alexander testifying at trial. The prosecution was not required to waste time and resources in a pointless effort to secure Alexander's attendance at trial. . . ."

Under federal law, to demonstrate that a witness is "unavailable" requires that the prosecutor make a good faith effort to obtain the witness' presence. *See Barber v. Page*, 390 U.S. 719, 724-25 (1968); *United States v. Olafson*, 213 F.3d 435, 441-42 (9th Cir. 2000) (good faith effort demonstrated where border patrol agents called witness, who had been inadvertently returned to Mexico, but witness refused to return to testify); *Windham v. Merkle*, 163 F.3d 1092, 1102 (9th Cir. 1998) (prosecutor made a good-faith effort to locate witness where he subpoenaed witness, met with witness to discuss proposed testimony after issuing subpoena, tried to call witness three times as trial date approached, contacted witness' parole officer, had a bench warrant issued for witness' arrest, and assigned a criminal investigator to locate witness). Given the prosecution's numerous attempts – more than a dozen - to secure Alexander's appearance at trial, the court concludes that it was reasonable for the state appellate court to find that the prosecution was sufficiently diligent and acted in good faith.

b. Reliability

The court also finds that the state court's reliability determination regarding Alexander's statements to Sanford while she was in the hospital, made only several hours after the incident, was reasonable. At the time that Alexander made the statements, she was lying down on a gurney, and was in transit from the trauma unit. Given the fact that Alexander had just suffered a serious head wound, resulting in depression of her skull, it is unlikely that she was in a condition that allowed for significant fabrication. Additionally, the fact that Alexander openly admitted to Sanford that she wielded a knife, with which she threatened Davis, suggests that she was honest regarding her role in the incident. Given the totality of the circumstances, there was a sufficiently "particularized guarantee[] of trustworthiness," such that the state court's conclusion was reasonable.

D. California Evidence Code Section 1240 Claims

In addition to admitting Alexander's statements to Sergeant Sanford, the trial court also admitted an additional out-of-court statement that Alexander made to Officer Salazar and two out-of-court statements made by her mother, including a 911 call and a statement to Officer Salazar. The state court admitted them as spontaneous statements pursuant to California Evidence Code § 1240, which allows for admission of statements that "purport[] to narrate, describe, or explain an act condition, or event perceived by the declarant," and that were "made spontaneously while the declarant was under the stress of excitement caused by such perception."

The legal standards for evaluating these Confrontation Clause claims are the same as those described above with respect to the statements admitted pursuant to § 1370.

i. Alexander's Statement to Officer Salazar

As noted, Officer Salazar testified that when he arrived at the scene shortly after notification regarding the 911 call, Alexander was lying face down in a pool of blood on the living room floor. He stated that she was "fading in and out," although she never completely lost consciousness and was able to respond to Salazar's questions.

When Officer Salazar asked Alexander what had happened, she responded that her boyfriend hit her with a hammer. She stated that her boyfriend was the petitioner, Anthony Davis. Alexander also told Salazar that right before hitting her with the hammer, Davis stated, "All right, bitch, I got something for you."

On appeal, the appellate court held that the trial court did not err in admitting the statements because the record demonstrated that Alexander made them without deliberation or reflection, and that they were sufficiently spontaneous and trustworthy.

The analysis of this issue is similar to that set forth above with respect to Alexander's statements to Sergeant Sanford, admitted pursuant to § 1370. In terms of reliability, Alexander's statements to Salazar, made immediately following the assault, while Alexander was still under the stress of the event, were likewise made under circumstances "that provide[d] substantial guarantees of their trustworthiness" and "without the opportunity to reflect on the consequences of [Alexander's] exclamation." *White*, 502 U.S. at 355-56 & n.8. The state appellate court's conclusion was not unreasonable.

The court notes, however, that contrary to California Evidence Code § 1370, § 1240 does not require the declarant's unavailability; accordingly, the state courts did not analyze Alexander's unavailability. Again, as was the case above, because the statements were not made in the course of a prior judicial proceeding, the absence of such inquiry was not contrary to clearly established Supreme Court law because it was not required for Confrontation Clause analysis. *See White*, 502 U.S. at 741. However, even if unavailability was required, for the same reasons as discussed above, review of the record sufficiently demonstrates Alexander's unavailability.

ii. Persons' 911 Phone Call and Statements to Officer Salazar

Persons made the 911 call seeking emergency medical attention for her daughter. At the time she called 911, she was hysterical and frantically sought medical help for her seriously injured daughter. During the course of the 911 call, Persons stated that

Davis hit Alexander in the head with a hammer, and that Alexander was bleeding profusely.

The trial court permitted the prosecution to place the 911 tape into evidence as a spontaneous statement under California Evidence Code § 1240. The trial court also permitted the prosecution to question Officer Salazar regarding Persons' statements to him at the scene of the crime pursuant to that same section.

Salazar testified that at the scene, approximately ten minutes after his arrival, Persons advised him that she was upstairs when she heard Davis and Alexander arguing. Subsequently, she heard what sounded like a slap and then heard her daughter scream to her to call the police. Persons then went downstairs and saw Davis and Alexander arguing, and attempted to separate them. Davis pushed Alexander, and she fell onto the couch. Davis then struck Alexander in the head with a hammer, and fled.

Citing state law only, the appellate court held that admission of Persons' statements did not violate Davis' Confrontation Clause rights because the statements were admitted pursuant to a "firmly rooted hearsay exception for spontaneous declarations." The court held that Persons' statements were sufficiently spontaneous because they were "made [to] the first person in whom [Persons] could confide and at the first opportunity." It rejected Davis' suggestion that Persons was not under sufficient stress or in a state of excitement, noting that even though Persons may not have appeared "overly emotional," she had just witnessed a brutal attack on her daughter who was in a lot of pain and going in and out of consciousness. It further held that Persons had sufficient personal knowledge of the attack on Alexander, and "was in a position to witness the brutal attack." Again, as was the case with Alexander's statements admitted under § 1240, the appellate court did not analyze Persons' unavailability because that was not a requirement under the statute.

Turning to Persons' statements to Salazar and those made in the course of her 911 call, the legal standards are identical to those set forth above. Because Persons' statements were not made in the course of a prior judicial proceeding, her unavailability was not required for purposes of the Confrontation Clause.[3] Additionally, because the statements were admitted as excited utterances, which the Supreme Court has recognized constitutes a "firmly rooted" hearsay exception, they were sufficiently reliable. Based on the record before it, the court concludes that the California Court of Appeal's determinations that Persons' statements to the 911 operator and to Salazar were indeed spontaneous, based on personal knowledge, and made under duress, were reasonable.[4]

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[3] The court is unable to analyze Persons' unavailability as it did with respect to Alexander because the parties have not raised or addressed this issue. However, based on the record before it, it does appear that Persons, unlike Alexander, was available to testify at trial. In fact, the state notes in its opposition brief that Persons appeared in chambers on the first day of trial. *See* Oppos. at 24 (citing July 13, 1998 R.T.).

[4] The court reiterates that given the Supreme Court's recent decision in *Bockting*, 127 S.Ct. 1173, in which the Court held that *Crawford* does not apply retroactively, it is following pre-*Crawford* law governing analysis of Confrontation Clause

E. Trial Court's Denial of Davis' First Motion for a New Trial

Davis also contends that newly discovered evidence presented at his motion for a new trial confirmed a violation of his Confrontation Clause rights.

After trial, Davis moved for a new trial pursuant to California Penal Code section 1181 on four grounds, including: (1) that newly discovered evidence showed that Alexander and her mother contrived to misrepresent what happened in order to protect Alexander from criminal charges, and their statements to the police were, therefore, inadmissible as spontaneous statements; (2) for the same reasons, Alexander's statement to Sanford was not trustworthy and was inadmissible under California

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claims. This includes the analysis as it pertains to admission of the 911 call statements. The court acknowledges that in *Davis v. Washington*, a case involving the admission of 911 call transcripts, the Supreme Court elaborated on its holding in *Crawford.* 126 S.Ct. 2266 (2006). In *Davis*, the Court addressed a statement made by a woman to a 911 operator reporting she had been assaulted. 126 S.Ct. at 2270-71. That recorded statement was later used at trial to prosecute Davis (the woman's former boyfriend) for a felony violation of a domestic no-contact order. *Id.* at 2271. The Court considered the 911 operator's questioning of the woman to be an interrogation, *id.* at 2274 n. 1, and the operators themselves to be at least "agents of law enforcement," id. at 2274 n. 2. In the face of the *Davis* defendant's objection that introduction of the statement violated the Sixth Amendment, the Court held that when the objective circumstances indicate the "primary purpose" of police interrogation is to meet an ongoing emergency, the statements elicited in response are nontestimonial, and are not subject to the requirements set forth in *Crawford. Id.* at 2273-74. However, because *Davis* was decided after *Crawford*, it is not applicable to this case.

Evidence Code section 1370 and the Confrontation Clause; (3) the trial court erred as a matter of law in finding Alexander unavailable as a witness; and (4) the jury verdict was not supported by the evidence. In the instant federal petition, Davis challenges the state court's denial of his motion for new trial on the first three grounds only.

In support of his motion for a new trial, Davis presented the testimony of Alexander and Persons. Persons testified at the hearing on the motion that contrary to her statements to Officer Salazar, as testified to by Officer Salazar, and on the audiotape of her 911 call, she did not actually observe Davis hit Alexander with the hammer. She testified, instead, that Alexander told her that Davis hit her in the head with the hammer, and advised Persons to lie to the police that she had observed it. Persons attested that she lied to Officer Salazar at the scene and during the 911 call because she was mad at Davis since he had been drinking.

Persons admitted that she was testifying at the hearing on Davis' motion for a new trial because she wanted to help him get out of jail. She also admitted that she was "panicked" and "scared" at the time she made the 911 call because her daughter was laying in a pool of blood, and stated that she did not remember what she had said on the 911 call.

Alexander also testified at the motion hearing that she advised her mother what to tell the police. Alexander testified that she charged Davis with a knife prior to him "accidentally" hitting her in the head with a hammer. She asserted that she wanted her mother to lie about her role in the incident because she was mad at Davis as a result of her head injury.

The trial court denied Davis' motion for a new trial on all four bases, including the three at issue in the instant petition. First, the court denied Davis' motion on the basis of alleged new evidence. In characterizing Davis' argument, the trial court noted that he contended that Alexander and Persons "because of their complicity and the way they contrived the utterances that were introduced as spontaneous declarations, under the hearsay evidence exception of spontaneous utterances, could not have been [spontaneous] because they were contrived. . . [and] based upon . . . calculation and planning . . . to falsify the nature of the report they were making." R.T. 311.

The trial court determined that Alexander and Persons' testimony regarding their alleged collusion and falsification of their statements to the police was not really "newly discovered" evidence. R.T. 311-12. It concluded instead that the jury had heard everything that it needed to in order to evaluate the credibility and alleged spontaneous nature of the women's statements to the police. *Id.* at 312. It noted that the jury heard not only the officers' testimony regarding the women's statements and the 911 tape, but also "heard from Mr. Nigel Phillips [the defense investigator] that prior to the trial, [ ] Alexander had indicated that she was the aggressor in the assault, and that [Davis] essentially engaged in an act of self defense . . . and that essentially, [Alexander] recanted." *Id.* at 311. The trial court further noted other evidence before the jury concerning Alexander's inconsistent stories and her subsequent recantation, including the fact that Alexander had, after the incident, married Davis and was still in contact with him.

Additionally, the trial court found that Alexander's and Persons' testimony at the motion hearing was "less than credible." *Id.* at 312. Credibility aside, however, the trial court ruled that "nevertheless, the gist of the spontaneous utterance and [Alexander's] declaration before the trial court to Mr. Phillips recanting was sufficient for the jury to assess all issues of credibility regarding statements." *Id.*

The trial court also denied Davis' motion on the grounds that the new evidence called into question the Sanford's testimony regarding Alexander's statements, admitted pursuant to California Evidence code section 1370. *Id.* at 314-15. It further upheld its original ruling that, as a matter of law, Alexander was "unavailable," allowing admission of the statements pursuant to section 1370.

On direct appeal to the California Court of Appeal, Davis did not challenge the trial court's ruling on his first motion for new trial on constitutional grounds. Instead, he claimed only that the trial court abused its discretion in denying his motion. Accordingly, the appellate court ruled only on those grounds, concluding that the record did not "support a finding of manifest and unmistakable abuse of discretion." In affirming the trial court, it held:

> The evidence proffered by Davis was hardly 'newly discovered' after trial. Because defense counsel knew of Persons and Alexander and of their change of heart with respect to what they originally told the police prior to the close of trial, the evidence could not be considered

> newly discovered. Both Alexander and Persons had been living in San Francisco during the court proceeding, yet they waited until after the verdict to offer their testimony. The court was entirely justified in its conclusion that Alexander and Persons' potential testimony was not newly discovered.

Moreover, the appellate court concluded that "[g]iven the fact that the proffered evidence could not negate the medical evidence presented at trial as well as the court's doubts about the witnesses' credibility, the trial court acted within its discretion in denying the motion for a new trial."

However, Davis did raise the instant constitutional claim with respect to the trial court's denial of his motion for a new trial in his petition for review before the California Supreme Court, which the court summarily denied. Specifically, Davis claimed that "newly discovered evidence confirms violation of petitioner's confrontation right by the admission of Alexander's and Persons' hearsay statements."

Respondent contends that Davis has not stated a claim cognizable on federal habeas review. Respondent is correct that federal habeas relief is unavailable for violations of state law or for alleged error in the interpretation or application of state law. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Federal courts generally are bound by a state court's construction of state laws, including the denial of a motion for new trial under state law, unless the petitioner can show an *independent violation of his federal constitutional rights. See, e.g., Melugin v. Hames,* 38 F.3d 1478, 1487 (9th Cir. 1994) (federal court bound by Alaska Court of Appeals' interpretation and decision that state statute was properly applied to petitioner's conduct); *see also Moore v. Casperson*, 345 F.3d 474, 482 (7th Cir. 2003) (petitioner who challenged trial court's failure to grant him a new trial based on newly discovered evidence must demonstrate underlying constitutional violation); *Coleman v. Newland*, 2001 WL 725388 at *7 (N.D. Cal. 2001) (petitioner must identify federal constitutional right violated by trial court's denial of motion for new trial based on new evidence).

Davis' argument that the trial court's denial of the new trial confirms violation of his confrontation rights has already been addressed by this court in the context of the discussion of his other Confrontation Clause claims discussed above. He presents no new arguments or legal authority in support of his contention that the denial of a new trial violated his Sixth Amendment rights. Moreover, to the extent that Davis is claiming that his due process rights were violated by the trial court's denial of his motion for a new trial, it is without merit. *See, e.g, Moore*, 345 F.3d at 482 (treating petitioner's similar challenge as one alleging a violation of due process). The state court's determination that Alexander's and Persons' testimony did not constitute "newly discovered" evidence was reasonable and supported by the record, which clearly reveals that the jury heard and considered sufficient evidence regarding Alexander's subsequent recantations and assertion that Davis assaulted her in self-defense.

III. Cumulative Error

Finally, Davis asserts that the cumulative effect of errors warrant reversal. "Cumulative error applies where although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant." *Mancuso v. Oliverez*, 292 F.3d 939, 957 (9th Cir. 2002).

Because there was no single constitutional error in this case, there can be no cumulative effect.

CONCLUSION

For the reasons set forth above, Davis' petition for writ of habeas corpus is DENIED because the appellate court's decision was neither contrary to, nor an unreasonable application of, clearly established federal law; nor was it based on an unreasonable determination of the facts in light of the evidence presented. This order fully adjudicates the motion listed at No. 1 of the clerk's docket for this case and terminates all other pending motions. The clerk shall close the file.

IT IS SO ORDERED.

Dated: August 2, 2007

PHYLLIS J. HAMILTON
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTHONY T. DAVIS,
Petitioner - Appellant,

v.

D.L. RUNNELS,
Respondent – Appellee.

No. 07-16601

D.C. No. CV-02-00538-PJH
Northern District of California,
San Francisco

ORDER

FILED JUNE 30, 2009

Before: THOMAS and PAEZ, Circuit Judges, and EZRA, *District Judge.

The panel has voted to deny the petition for rehearing. Judges Thomas and Paez voted to deny the petition for rehearing en banc and Judge Ezra so recommends.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are rejected.

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* The Honorable David Ezra, United States District Judge for the District of Hawaii, sitting by designation.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,
Plaintiff and Respondent,

v.

ANTHONY TYRONE DAVIS,
Defendant and Appellant

A086104

(City & County of S.F. Super. Ct. No. 170421)

FILED NOV. 13, 2000

[EXCERPTED]

I.

INTRODUCTION

Appellant Anthony Tyrone Davis was convicted by jury of one count of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)), and with great bodily injury (Pen. Code, § 12022.7, subd. (a)) resulting from his violent assault on his girlfriend during a domestic dispute. He was sentenced to a total prison term of 38 years to life under California's three strikes law. (Pen. Code, § 667, subds. (b)-(i).) On appeal, he makes numerous challenges to the court's evidentiary rulings, which permitted the jury to consider several out-of-court statements made by the victim and the victim's mother, neither of whom testified at trial. In this regard, Davis presents the question of whether

Evidence Code section 1370 on its face violates the Confrontation Clause of the Sixth Amendment to the United States Constitution. In addition, Davis claims the court erred in denying two motions for a new trial, the first premised on newly discovered evidence, and the second premised on ineffective assistance of trial counsel. Davis also contends the trial court erred by refusing to strike two prior felony convictions for sentencing purposes. We affirm.

II.

FACTS AND PROCEDURAL HISTORY

On February 1, 1998, at approximately 3:00 a.m., Davis struck Ella Alexander, his girlfriend and cohabitee, on the head with a hammer during an argument. Alexander suffered a depressed skull fracture as a result of this blow. At trial, Davis did not contest that he was the person who inflicted the injury. The question that confronted the jury was the circumstances of the injury—whether Davis acted as the aggressor or whether the blow was inflicted by accident or in self-defense.

Although the victim, Alexander, was served with subpoenas on three separate occasions during the course of these proceedings, she did not appear to testify. The only other person at the residence at the time of the altercation, Alexander's mother, Gloria Persons, also did not testify at trial. However, the jury heard evidence of numerous conflicting out-of-court statements made by Alexander and Persons at different points in time to different people describing the events surrounding the altercation. In summarizing the evidence at the conclusion of trial, the prosecutor acknowledged: "You have conflicting stories on this. There is [sic] a lot of different accounts you heard. No two accounts are the same."

At trial, the jury heard the testimony of Officer Joseph Salazar of the San Francisco Police Department, one of the officers who responded to the 911 call placed by Gloria Persons. He testified that when he asked Alexander what happened, she stated that her boyfriend had hit her in the head with a hammer. He asked who her boyfriend was and she responded, "Anthony Davis." Alexander told Officer Salazar that before hitting her, Davis said, "All right, Bitch, I got something for you." Officer Salazar interpreted this as a threat to kill Alexander.

While at the scene, Officer Salazar also spoke to Gloria Persons. She provided a more detailed account of what happened. Persons said that while she was upstairs, she heard Davis and Alexander arguing. She went downstairs and witnessed Davis push Alexander, who fell onto the couch. Davis then hit Alexander in the head with a hammer.

San Francisco Police Sergeant John Sanford, Jr. interviewed Alexander the morning after the incident at the hospital. She provided yet another account of the altercation. Sergeant Sanford taped the interview. Alexander told Sergeant Sanford that she received the injury when Davis hit her over the head with a hammer earlier that morning. They had been arguing, and at one point she realized Davis was holding a hammer. She acknowledged she had a knife "'[j]ust to scare him . . . .'" She admitted pulling the knife on Davis before she saw the hammer. According to Alexander, Davis reached for a cigarette, and she slapped his hand away. Sergeant Sanford recalled Alexander telling him she was sitting on the couch when she was hit with the hammer. After he hit her, Davis said, "Oh, my God," and ran out of the house. According to Alexander, her mother was upstairs at the time of the assault.

Alexander also gave a statement to Nigel Phillips, the defense investigator, shortly before trial commenced, in an effort to exonerate Davis. Phillips was allowed to testify about the contents of Alexander's statement, which was given over the telephone. In her statement, Alexander indicated that she got into an argument with Davis after they had consumed a large quantity of alcohol. She went into the kitchen and got three knives. When the argument resumed, Alexander had a knife in each hand and she started thrashing and slashing the knives at Davis's face and neck. Davis grabbed a hammer in an attempt to defend himself and tried to knock the knives out of her hands. During this melee, the hammer slipped and hit Alexander on the head, causing her injury. Alexander told the investigator that she believed her mother was upstairs during the entire incident.

The jury also learned that Alexander had called the District Attorney's Office several months after the incident indicating she wanted to drop the charges against Davis. She claimed that the whole incident was just a drunken accident. Although questioned, Alexander refused to provide any more details.

The most damaging evidence to the theory that Davis acted in self-defense was the testimony of Dr.

Grant Gauger, acting chief of neurosurgery at San Francisco General Hospital and associate clinical professor at the University of California. As already noted, in providing a statement exonerating Davis of any wrongdoing, Alexander told the defense investigator that during the melee, the hammer had simply slipped, hitting her on the head. However, Dr. Gauger explained that considerable force is required to break the skull, as well as a controlled, guided blow. He stated it was unlikely that such an injury would result from a hammer slipping from someone's hand.

It was stipulated that Alexander was five feet ten inches tall and weighed 225 pounds when she was struck by the hammer. Given Alexander's size and the fact that the injury was on the very top of her skull, the prosecutor argued that Alexander "had to be sitting down" at the time of the injury, which severely undercut Davis's self-defense claim and was consistent with some of the out-of-court statements made by Alexander and her mother. In rebuttal, the defense also attempted to use Alexander's size to its advantage, arguing, "[A] man might need to defend himself against a woman, and in this case, not a petite woman, five feet ten inches tall, 225 pounds, drunk and coming at you with two knives. . . . You bet you're going to do whatever you can to try to get those knives out of her hand."

After Davis was convicted, the court found two prior convictions qualifying as "strike" priors within the meaning of Penal Code sections 667, subdivisions (d)-(e), and 1170.12, subdivisions (b)-(c). The trial court denied Davis's request to dismiss the two strike priors, and he was sentenced to a total prison term of 38 years to life.

III.

EVIDENTIARY RULINGS

A. Admission of Statements by Alexander Under Evidence Code section 1370

Davis makes a multi-pronged challenge to the admission of Alexander's February 1, 1998 statements to Sergeant Sanford while she was in the hospital being treated for her injuries. The trial court allowed the prosecution to introduce the statements in rebuttal pursuant to Evidence Code section 1370 after Alexander's statement to defense investigator Nigel Phillips had already been introduced into evidence.[1]

This 1996 enactment provides in relevant part: "(a) Evidence of a statement by a declarant is not made inadmissible by the hearsay rule if all of the following conditions are met: [¶] (1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant. [¶] (2) The declarant is unavailable as a witness pursuant to Section 240. [¶] (3) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of statements made more than five years before the filing of the current action or proceeding shall be inadmissible under this section. [¶] (4) The statement was made under circumstances that would indicate its trustworthiness. [¶] (5) The statement was made in writing, was electronically recorded, or made to a law enforcement official. [¶] (b) For purposes of paragraph (4) of subdivision (a), circumstances relevant to the issue of trustworthiness include, but are not limited to, the following: [¶] (1) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested. [¶] (2) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive. [¶] (3) Whether the statement is corroborated by evidence other than statements that are admissible only pursuant to this section. . . ."

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[1] After respondent filed its brief responding to this argument, Davis filed a "Motion to Strike Material and Respondent's Brief." In this motion, Davis claims respondent unfairly bolstered its argument on this issue by relying on material that cannot be considered on appeal. By order of this court, dated March 14, 2000, we deferred ruling on this motion pending a decision on the merits. The motion is denied.

Davis argues that: 1) Evidence Code section 1370 is unconstitutional on its face, in that it violates the confrontation clause of the Sixth Amendment; 2) the trial court erred in finding Alexander unavailable, a requirement for admission of hearsay statements pursuant to Evidence Code section 1370; and 3) Alexander's statements to Sergeant Sanford were not made under circumstances that guarantee trustworthiness, also a requirement of Evidence Code section 1370. We consider each of these arguments in succession.

1. Constitutionality of Evidence Code section 1370

* * *

2. The Showing of Good Cause to Proceed With Hearsay Evidence Because of Alexander's Unavailability Was Sufficient

* * *

3. Alexander's Statements Were Trustworthy in the Circumstances in Which They Were Made

Davis further contends that the trial court erred when it found Alexander's statements to be sufficiently reliable so as to warrant admitting them into evidence pursuant to Evidence Code section 1370. As we have noted, the proponent of hearsay evidence under Evidence Code section 1370 must not only show that there is good cause to proceed with such proof, but also that the evidence possesses a substantial degree of trustworthiness. The language of Evidence Code section 1370 contains particularized guarantees of trustworthiness and adequate indicia of reliability by requiring the statement to he made (1) at or near the time of the incident (similar to a spontaneous declaration) by a person who experienced the incident, firsthand, (2) under circumstances indicating its trustworthiness, including whether it had been made in contemplation of litigation, whether the declarant had a bias or motive to fabricate and whether it is corroborated by other evidence not admissible under Evidence Code section 1370, and (3) to have been recorded in writing or electronically, or to have been made to a police officer (who normally makes a written report of such statements). Davis submits that there are no guarantees of trustworthiness for the taped statements given Sergeant Sanford because the record shows that Alexander might have lied to the police in order to minimize her own criminal culpability.

"The trial court holds wide discretion to determine whether evidence is admissible, and such a determination will not be disturbed unless there is a clear showing that the court has abused its discretion. [Citation.]" (*In re Troy D.* (1989) 215 Cal.App.3d 889, 902.) However, "when deciding whether the admission of a declarant's out-of-court statements violates the Confrontation Clause, courts should independently review whether the government's proffered guarantees of trustworthiness satisfy the demands of the Clause." (*Lilly, supra*, 527 U.S. at p. 137.) At oral argument the parties agreed that under *Lilly,* we must independently review an evidentiary ruling that affects a defendant's Sixth Amendment right to confront witnesses.

In evaluating the trustworthiness of hearsay evidence, a court may consider only those circumstances that surround the making of the statement and that render the declarant particularly worthy of belief. (See *Idaho v. Wright, supra*, 497 U.S. at p. 819.) Other evidence admitted at trial cannot be used to corroborate the veracity of the hearsay or to support a claim that the statement bears the requisite guarantees of trustworthiness. (See *Lilly, supra*, 527 U.S. at p. 135 [state may not bootstrap on trustworthiness of other evidence].)

The circumstances in which Alexander gave the statement, while she was in the hospital eight hours after the attack, suggests that she was still under the stress of being assaulted and severely injured. When Sergeant Sanford arrived at the hospital, Alexander was lying down on a gurney and was being moved from the trauma unit. She had visible trauma to her head. Alexander had been drinking heavily immediately before the incident and the record indicates that she spent the seven-hour lapse of time receiving emergency medical treatment for her crushed skull, which is not a physical or emotional state that allows for much reflection or contrivance. The statement was tape-recorded, and there was a transcript of Alexander's statement available to Davis and his attorney, which allowed the defense to ensure that Sergeant Sanford was not putting words in Alexander's mouth.

We believe that the statement in question must be considered as possessing sufficient indicia of trustworthiness and reliability to warrant its admission. First, we are satisfied that the statement is not of the type whose reliability is particularly suspect—such as a custodial confession made to law enforcement authorities that shifts or spreads blame from the declarant to incriminate co-criminals. Rather, we believe that Alexander's statement to Sergeant Sanford had sufficient indicia of reliability present at the time the statement was made to make it trustworthy. The circumstances in which the statement was made provide no reason to suspect any coercion, any ulterior motive, any desire to curry favor with authorities, nor any reason not to tell the truth.

B. Admission of Statements by Gloria Persons under Evidence Code Section 1240, the Spontaneous Utterance Exception

We next resolve Davis's contention that the hearsay statements of Gloria Persons, the victim's mother, made shortly after the assault upon her daughter did not qualify for admission under the spontaneous declaration exception to the hearsay rule (Evid. Code, § 1240). Two hearsay statements by Ms. Persons were admitted under this exception: 1) the tape of her 911 call, and 2) her statement to Officer Salazar about a half-hour later when he came to the residence in response to the call.

1. The 911 Call

Over objection, the trial court permitted the prosecutor to introduce the tape of the 911 call made by Gloria Persons seeking emergency medical attention for her daughter, Alexander, after Davis hit her in the head with a hammer. When Persons called 911, she was in a hysterical state, frantically trying to help her seriously injured daughter. Alexander was bleeding profusely. She was in pain. During the telephone call, Persons identified Davis as the person who hit Alexander in the head with the hammer.

2. Statement to Officer Salazar

Over objection, Officer Salazar was allowed to testify that when he arrived on the scene within minutes of the 911 call, Persons was there, trying to treat Alexander's head wound. Persons did not appear "overly emotional," but she was "very concerned about the injury to her daughter's head." He left for about 10 minutes to look for Davis. When he returned, Persons answered Officer Salazar's questions. Persons told Salazar that she was upstairs when she heard Davis and Alexander arguing downstairs. She heard a slap, and then heard her daughter cry out, "Mama, call the police." Persons went downstairs and saw Davis and Alexander arguing. She tried to separate them. Davis pushed Alexander, who fell onto the couch. He then hit Alexander in the head with a hammer.

3. Discussion

Evidence Code section 1240 provides that evidence of a statement is not made inadmissible by the hearsay rule "if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." "'To render [statements] admissible [under the spontaneous declaration exception] it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.' [Citations.]" *(People v. Gutierrez* (2000) 78 Cal.App.4th 170, 177; see also *People v. Anthony O.* (1992) 5 Cal.App.4th 428, 436; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1289-1290.)

Davis claims that the statements were erroneously admitted because Persons was not a percipient witness to the attack, because the prosecution failed to establish that the statement was spontaneous and unreflecting, and finally, that the admission of the statements violated his constitutional right to confront and cross-examine the witness.

"Whether a statement satisfies the requirements of the spontaneous declaration exception is 'largely a question of fact' and is within the discretion of the trial court. [Citations.] On appeal, the trial court's finding on this issue will not be disturbed unless those facts on which it relied are not supported by a preponderance of evidence. [Citations.]" (*People v. Trimble* (1992) 5 Cal.App.4th 1225, 1234; see also *People v. Phillips* (2000) 22 Cal.4th 226, 235-236.)

The basis for holding spontaneous statements trustworthy is that "'. . . in the stress of nervous excitement, the reflective faculties may be stilled and the utterance may become the instinctive and uninhibited expression of the speaker's actual impressions and belief. [¶] The crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is thus not the nature of the statement but the mental state of the speaker. The nature of the utterance—how long it was made after the startling incident and whether the speaker blurted it out, for example—may be important, but solely as an indicator of the mental state of the declarant.' [Citation.]" (*People v. Trimble, supra*, 5 Cal.App.4th at pp. 1234-1235 [upholding admission of two and one-half-year-old child's statement made the day after witnessing mother's murder]; *In re Damon H.* (1985) 165 Cal.App.3d 471,476.)

Factors such as the nature of the utterance and the lapse of time between the event and the utterance may be important, but only insofar as they indicate the mental state of the declarant. (*People v. Raley* (1992) 2 Cal.4th 870, 892-893.) Neither the lapse of time between the event and the declarations, nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity if it appears that they were made under the stress of excitement and while the reflective powers were still in abeyance. *(People v. Farmer* (1989) 47 Cal.3d 888, 904, disapproved on other grounds in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6; *People v. Poggi* (1988) 45 Cal.3d 306, 319; *People v. Trimble, supra*, 5 Cal.App.4th at p. 1234; see *People v. Raley, supra*, 2 Cal.4th at p. 893.) The California Supreme Court has decreed that the discretion of the trial court is at its broadest when determining whether the utterance was made before the declarant had time to reflect and perhaps to misrepresent, based on the specific facts of the individual case. (*People v. Poggi, supra*, 45 Cal.3d at pp. 318-319.)

In the case at bench the victim's mother made the statements to the first trustworthy person in whom she could confide and at the first opportunity, supporting the trial court's determination that the passage of time did not negate the statement's spontaneous nature. (See generally *People v. Trimble, supra*, 5 Cal.App.4th at p. 1235.) Also, the fact that the declarant's daughter was still in pain and going in and out of consciousness at the time of the statement supports a finding of spontaneity. In arguing that Persons's statements do not come within the spontaneous declaration exception because the declarant was not truly excited, Davis points to Salazar's testimony that Persons was "[n]ot overly emotional. She looked very concerned about the injury to her daughter's head." Davis indicates he "is aware of no case holding that a statement while concerned qualifies as an excited utterance."

However, Salazar's description of Persons's demeanor does not conclusively negate the court's implicit finding that Persons was still operating under the stress of the event when she gave her statement to the officer. As our Supreme Court has explained, "the fact that the declarant has become calm enough to speak coherently . . . is not inconsistent with spontaneity. [Citations.] To conclude otherwise would render the exception virtually nugatory: practically the only 'statements' able to qualify would be sounds devoid of meaning." (*People v. Poggi, supra*, 45 Cal.3d at p. 319.) Based on this evidence, the trial court acted well within its discretion in concluding that Persons was still under the stress of excitement caused by witnessing the attack on her daughter when she told Officer Salazar what had happened and when she spoke to the 911 operator on the phone.

Davis complains that the declarant, Gloria Persons, was not a percipient witness to the assault. The record reflects the evidence on this point is in conflict. Officer Salazar testified that Persons indicated to him that she witnessed Davis strike Alexander on the head with the hammer. However, while she was hospitalized, Alexander gave a statement to the police indicating that her mother was upstairs when she was struck with the hammer.

Evidence Code section 1240 makes clear that the declarant must have personal knowledge of the event to which the statement relates. (*People v. Phillips, supra*, 22 Cal.4th at p. 235.) The statutory language refers to statements concerning an event "perceived by the declarant." "It must, therefore, appear 'in some way, at least, and with some degree of persuasive force' that the declarant was a witness to the event to which his utterance relates. [Citation.] Although this does not require direct proof that the declarant actually witnessed the event and a persuasive inference that he did is sufficient, the fact that the declarant was a percipient witness should not be purely a matter of speculation or conjecture. [Citations.]" (*Ungefug v. D'Ambrosia* (1967) 250 Cal.App.2d 61, 68 (*Ungefug*).) The declarant's personal knowledge, however, may often he inferred from the nature of the spontaneous statement itself. In fact, the spontaneous statement describing an event may be "sufficient, *by itself*, to prove that the declarant observed such event." (*People v. Jones* (1984) 155 Cal.App.3d 653, 661, quoting 1 Jefferson, Cal. Evidence Benchbook (2d ed. 1982), § 13.1, p. 373, analyzing *People v. Worthington* (1974) 38 Cal.App.3d 359, italics added.)

The evidence and the reasonable inferences from the evidence, including the nature of the statement itself, amply support a determination both that Persons was in a position to witness the brutal attack on her daughter and that the statements she made to law enforcement authorities describes her perception.

Davis's reliance on *Ungefug, supra*, is misplaced. *Ungefug* involved a cause of action for wrongful death brought by the surviving husband and daughter of a woman who had been fatally injured when struck by an automobile. (250 Cal.App.2d at p. 63.) The trial court allowed the ambulance driver to testify that as he was preparing to lift the decedent on the gurney, he heard somebody say that the victim had been hit twice, once by another car that failed to stop. (*Id.* at p. 64.) The Court of Appeal concluded that it was error to allow this testimony because "defendant failed to show except by the remotest inference, conjecture or speculation that the one who made the statement saw the accident." (*Id.* at p. 68.) The Court of Appeal reasoned that the declarant "may have been merely repeating what others, including defendant, might have said." (*Ibid.*) The *Ungefug* decision simply exemplifies the requirement that "the declarant must have perceived what he describes or explains." (See *People* v. *Farmer, supra*, 47 Cal.3d at p. 905.)

Here, unlike *Ungefug*, no speculation is necessary to conclude that Persons observed the events that she described to Officer Salazar. In other words, substantial evidence supports a determination that the declarant perceived the assault and that her remarks described or explained what she saw. Persons stated that she saw Davis push Alexander down on the couch and hit her in the head with the hammer. This statement is sufficient to create "some degree of persuasive force" that the declarant saw the events she described. Nothing more is necessary. (*People* v. *Provencio* (1989) 210 Cal.App.3d 290, 302-303.)

As to the constitutional requirement of confrontation, we have already noted that "[t]he requirements of the confrontation provisions are satisfied by statements admitted under the firmly rooted hearsay exception for spontaneous declarations." (*People* v. Trimble, *supra,* 5 Cal.App.4th at p. 1235; see also *People* v. *Farmer, supra,* 47 Cal.3d at pp. 905-906 [admission of spontaneous utterances does not violate the confrontation clause]; *People* v. *Duke* (1999) 74 Cal.App.4th 23, 29-30.)

C. Admission of Statements by Alexander under the Spontaneous Utterance Exception

Appellant next contends the court erred in admitting Alexander's hearsay statement to Officer Salazar. Officer Salazar arrived at the scene shortly after the dispatcher put out the 911 call. When he arrived, Alexander was lying face down on the living room floor. There was a pool of blood by her head. Alexander was "fading in and out . . . there one minute and then kind of, you know, it seemed like she would pass out for a second. But it wasn't like she was really out, you know, where she couldn't respond to my questions." While Alexander would seem to pass out for a second, she never totally lost consciousness, and understood and responded to the officer's questions.

Officer Salazar asked her what happened. She said her boyfriend hit her with a hammer. He asked who her boyfriend was, and she responded Anthony Davis. In her statement to Salazar, Alexander remembered that before hitting her with the hammer, Davis said, "All right, Bitch, I got something for you." Salazar testified his conversation with Alexander lasted "a good three to four minutes."

Davis argues the statement was not spontaneous or trustworthy but instead, was a deliberate and reflected effort to deflect blame. He argues that, "[e]verything said by Ms. Alexander during the interview was in a response to a direct question." Furthermore, "[a]t the time she was questioned, Ms. Alexander was semi-conscious. She had strong motives to fabricate to avoid liability for her own conduct. The statement she gave was at best incomplete."

As already noted, we must consider whether the statement was admissible because the circumstances surrounding the making of the statement demonstrated its trustworthiness and reliability. (See *Lilly, supra*, 527 U.S. at p. 137 [reviewing courts should independently review whether the government's proffered guarantees of trustworthiness satisfied the demands of the confrontation clause].) Officer Salazar's testimony establishes that the challenged statements were made while Ms. Alexander was distraught and in severe pain, with little or no opportunity to reflect or fabricate. (See *People v. Farmer, supra*, 47 Cal.3d at p. 900; *People v. Raley, supra*, 2 Cal.4th at pp. 893-894.) He testified that Ms. Alexander was "semi-coherent" and "fading in and out" of consciousness while she recounted what had happened. Here, the only evidence of questioning was Officer Salazar's statement that he asked Alexander simple questions, such as "what happened?" and "who's your boyfriend?" whereupon Alexander gave her answers.

We cannot say such questions deprived Alexander of spontaneity or trustworthiness. Replies to simple inquiries may still be spontaneous within the meaning of he spontaneous utterance exception to the hearsay rule. (See, e.g., *People v. Farmer, supra*, 47 Cal.3d at p. 904.)

In sum, the evidence supports the conclusion that Alexander did not have the power to reflect on her answers to Officer Salazar and that her statements were made without deliberation or reflection. (*People v. Farmer, supra*, 47 Cal.3d at p. 903 [statement made by shooting victim in response to questioning by police admissible as a spontaneous statement]; *People v. Poggi, supra,* 45 Cal.3d at pp. 319-320 [statements made by victim to police in response to questioning 30 minutes after knife attack admissible].) In short, the trial court did not err in admitting Alexander's statements as spontaneous declarations under Evidence Code section 1240.

IV.

MOTIONS FOR NEW TRIAL

* * *

V.

SENTENCING

* * *

VI.

DISPOSITION

The judgment is affirmed.

Ruvolo, J.

We concur:

Haerle, Acting P.J.

Lambden, J.

TRANSCRIPT ON APPEAL
COURT OF APPEALS OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

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PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, v. ANTHONY T. DAVIS, Defendant/Appellant.	APPELLATE NO. A086104 SAN FRANCISCO CITY AND COUNTY NO. 170421 / 1769112

ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

THE HONORABLE ROBERT L. DONDERO, JUDGE

REPORTER'S TRANSCRIPT ON APPEAL [**EXCERPTED**]

JULY 14, 1998

VOLUME 2

REPORTED BY: SARA LERSCHEN, CSR #6213, RMR, CRR

* * *

OPENING STATEMENT

MR. BRASS: Good morning. My name is Anthony Brass, and I represent the People of the State of California in this case, the case against Mr. Anthony Davis.

You already know that this is a case about domestic violence. That means the person that he assaulted was his girlfriend, his girlfriend, who he lived with. And on February 1st of 1998, this man armed himself with a hammer, grabbed that hammer, and he used it to bash in Ella Alexander's skull.

It was 3:00 in the morning on February 1st. The defendant, Ella and Gloria, the victim's mother, were all home at 215 Blythdale right here in San Francisco. Gloria was getting ready to go to sleep, and Ella and the defendant were arguing. They were having a fight. They were yelling at each other back and forth, and that argument escalated.

And as it escalated, Gloria, who was in her bedroom upstairs, came downstairs to see what was going on. She talked to her daughter. She saw her daughter, and her daughter was picking up knives, and Gloria said, "What are you doing? This is not worth all that."

And Ella said, "Mama, I'm tired of him. I'm tired of this."

Gloria got Ella to put those knives down. She got her to calm down. At that point, once Ella was calmed down, Gloria went back upstairs.

And this man and his girlfriend, Ella, they kept fighting. The argument started again, only this time, Gloria hears somebody get hit. She hears a slap. She runs downstairs.

As she's going downstairs, she's passed on the stairs by this guy. He is going up the stairs as she's coming down, and he's saying things, saying, "I'm going to kill that bitch. I am going to kill that bitch." That's what he says as he's going up the stairs.

Well, Gloria goes to see her daughter. Ella's sitting on the couch in the living room. Her mom is standing in front of her. He comes back from the upstairs. He's got two items in his hands. In his right hand, he's got the telephone receiver, the receiver for the telephone that he disconnected from the upstairs phone. He's got that in one hand. He's got the hammer in the other.

He walks up to the two women, Ella sitting on the couch, her mom standing in front of her. Gloria says, "You're not going to hit my daughter. No, you're not; you're not hitting her with that."

And this guy reaches over Gloria, reaches over her with that hammer, doesn't shove her out of the way, doesn't stumble into them, he reaches over her with the hammer in his hand, and hits Ella right on top of the head, not in the front, but right here (indicating), right on top.

Now, you're going to hear from other witnesses besides Gloria. You're going to hear from Officer Salazar. He's the first one to arrive at 215 Blythdale. And when he arrived, he saw Ella. She was laying in a pool of her own blood, blood that was coming from her head. As she was going in and out of consciousness, she told him, "My boyfriend, Anthony Davis, hit me with a hammer."

Gloria talked to the officer, too.

The defendant was nowhere to be seen. He was gone, as was the phone receiver and the hammer.

You're also going to hear, not today, but tomorrow, you'll hear from Dr. Grant Gauger. He's the head neurosurgeon at San Francisco General Hospital. He's the doctor that treated Ella for her injuries, and he is going to tell you that she had a depressed skull fracture. That means something blunt pressed down really hard on the top of her head, causing a fracture to her skull. These are the facts of the case.

Now, you're also going to hear — and Mr. Leland Davis might even want me to testify about it, so I may be sitting in that chair testifying to you about a conversation that I had with Ella Alexander after this incident. Ella said it was all an accident.

The People are confident that you'll see through that, that you'll evaluate the evidence, and that you will render verdicts of guilty of both assault with a deadly weapon and domestic violence assault.

Thank you.

THE COURT: Do you want to call your first witness? And the defense will reserve; right?

MR. DAVIS: That's correct, Your Honor. Thank you.

THE COURT: All right.

MR. BRASS: Your Honor, the People call Officer Salazar to the stand.

And I would ask for one moment, Your Honor.

THE COURT: Okay.

(Pause in proceedings.)

MR. BRASS: You may be sworn.

JOSEPH SALAZAR

Called as a witness by the People, being duly sworn, testified as follows:

THE CLERK: Please state your name and spell it for the record.

THE WITNESS: My name's Joseph Salazar, first name J-O-S-E-P-H; my last name is S-A-L-A-Z-A-R.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. BRASS:

Q. Good morning, Officer Salazar.

A. Good morning.

Q. What is your occupation?

A. Police officer.

Q. Here in the City and County of San Francisco?

A. Yes, I am.

Q. For how long have you been with S.F.P.D.?

A. Three years.

Q. What are your duties now?

A. I'm a patrolman, police officer out on the street.

Q. In what district?

A. Ingleside.

Q. Is the address of 215 Blythdale in your district?

A. Yes, it is.

Q. On February 1st of 1998, at about 3:00 o'clock in the morning, were you working?

A. Yes, I was.

Q. Were you in a patrol car?

A. Yes, I was.

Q. And were you in uniform?

A. Yes, I was.

Q. And at that time, did you receive a call to respond to 215 Blythdale?

A. Yes, I did.

Q. And did you, in fact, respond there?

A. Yes, I did.

Q. When you arrived, what did you see?

A. When I arrived, I saw the victim, Ms. Alexander, lying face down in a pool of blood; and I also saw her mother, who was standing over her, trying to stop blood that was coming out of her head.

Q. Were they inside the residence?

A. Yes, they were.

Q. In what room was Ms. Alexander?

A. Front living room area.

Q. Was there furniture near Ms. Alexander?

A. Yes, there was.

Q. What sort of furniture was there?

A. I believe there was a couch to her on the right, a little T.V. entertainment center to the left.

Q. And you said Ms. Alexander was laying face down?

A. Yes.

Q. Could you see where the blood was coming from?

A. It looked like it was coming from her head.

Q. Did you see an injury on her head?

A. Yes, I did.

Q. Where was the injury?

A. Kind of like on the top, right side of her head.

Q. Did you speak to Ms. Alexander?

A. Yes, I did.

Q. She was conscious then?

A. Yes.

Q. At any point did you see her lose consciousness?

A. A couple times — I wouldn't say she lost consciousness totally, but you could tell she was kind of —

MR. DAVIS: Objection, nonresponsive.

THE COURT: He can describe what he saw. Overruled.

THE WITNESS: She was kind of like fading in and out, you know, there one minute and then kind of, you know, it seemed like she would pass out for a second. But it wasn't like she was really out, you know, where she couldn't respond to my questions.

BY MR. BRASS:

Q. Did you ask Ms. Alexander what had happened?

A. Yes, I did.

Q. And in response to the question, what did she say?

A. She said her boyfriend had hit her with a hammer.

MR. DAVIS: Objection, hearsay.

THE COURT: The exception is?

MR. BRASS: 1240, spontaneous statement.

THE COURT: Okay. Objection is overruled.

BY MR. BRASS:

Q. Officer, what did Ms. Alexander tell you?

A. I'd ask her, "Who was he?"

She said his name was Anthony Davis.

Q. Did she tell you how it was that her injury was inflicted?

A. Yes.

Q. And what did she tell you in that regard?

A. That he had hit her over the head with a hammer.

Q. Did she tell you whether the defendant, Mr. Anthony Davis, had said anything to her before hitting her?

A. He said that he was going to kill her.

MR. DAVIS: Objection, hearsay.

THE COURT: Same exception to the hearsay rule?

MR. BRASS: Yes, Your Honor.

MR. DAVIS: Double hearsay.

THE COURT: Okay. Her statements are spontaneous utterances.

MR. BRASS: Correct, Your Honor.

THE COURT: His statements are —

MR. BRASS: — not for the truth of the matter asserted.

THE COURT: All right. Go ahead.

BY MR. BRASS:

Q. Officer, did she tell you whether Mr. Anthony Davis said anything to her before hitting her with a hammer?

A. Yes. She had told me that he said, "I'm going to kill you, bitch."

Q. When you arrived at 215 Blythdale, did you see Mr. Anthony Davis there?

A. No, I did not.

Q. Are you acquainted with Mr. Davis?

A. I've seen him on a couple of occasions in the Sunnydale housing area.

Q. Do you know him by name?

A. Yes.

Q. Did you know him by name on February 1st of 1998?

A. I knew who he was.

MR. DAVIS: Objection, relevance.

THE COURT: Overruled. He knew him by name.

Go on. Next question.

BY MR. BRASS:

Q. Oh, Officer, do you see Mr. Davis in court today?

A. Yes, I do.

Q. Could you identify him by pointing out where he's sitting and describing what he's wearing?

A. Yes. He's sitting between the male and female. He's got a white-collared shirt underneath the tan sweater, long-sleeved.

MR. BRASS: Your Honor, may the record reflect that Officer Salazar has identified the defendant, Mr. Davis?

THE COURT: Yes.

BY MR. BRASS:

Q. Now, did you look for a hammer at the scene?

A. Yes, we did.

Q. Did you find one?

A. No.

Q. Did you have a conversation with Ms. Gloria Persons?

A. Yes, I did.

Q. And who is Ms. Persons?

A. That would be the mother of the victim Alexander.

MR. BRASS: I have nothing else at this time.

THE COURT: Okay. Cross.

MR. DAVIS: Thank you.

CROSS-EXAMINATION

BY MR. DAVIS:

Q. Good morning, Officer.

A. Good morning.

Q. You indicated that you arrived at the scene — about what time did you arrive at the scene?

A. A couple minutes, right after dispatch had put it out.

Q. Do you know what time of the morning that was?

A. It was 3:00 o'clock in the morning or so. I don't know exact minute, but it was 3:10, 3:15, around there.

Q. When you arrived at the scene, did you see any knives on the floor?

A. No, I did not.

Q. You didn't see any knives?

A. No.

Q. Did you look around the immediate area?

A. Yes.

Q. You indicated that Ms. Alexander told you certain things; correct?

A. Yes, she did.

Q. Was this just a statement that she made, or was it in response to questions that you were asking?

A. I had asked a question to her.

Q. And do you recall asking what, approximately three questions?

A. I don't recall exactly how many questions I asked her. I asked her a number of questions.

Q. And everything that she was telling you was in response to a direct question that you were posing; correct?

A. Yes.

Q. Did you ask her how much she had to drink?

A. No, I did not.

Q. But she told you that she had been drinking; correct?

A. Yes, she did.

Q. And did she tell you how much she had been drinking?

A. No, she did not.

Q. Did you smell alcohol on her breath?

A. No, I did not.

Q. She didn't mention to you that she had consumed somewhere between six and seven 40-ounce bottles of Old English?

A. No, she did not.

Q. Did she mention to you that she had gone after Mr. Davis with knives prior to being hit with the hammer?

A. No, she did not.

Q. Did you ask her about knives?

A. No, I did not.

Q. How long did your questioning of Ms. Alexander last?

A. I'd say a good three to four minutes.

Q. And you indicated that during that three-to four-minute period, she responded to all the questions you posed; right?

A. Yes, she did.

Q. Did you smell alcohol on Ms. Alexander's breath?

A. No, I did not.

Q. How close did you get to her?

A. I was right next to her.

Q. And you didn't smell any alcohol?

A. No, I did not.

Q. Did you ask her about whether or not she had smoked any marijuana?

A. No, I did not.

Q. Did she tell you that she had?

A. No, she did not.

Q. Aside from the injury that you saw on the top of her head, did you see any other injuries?

A. No. I was concerned about the head injury.

Q. You didn't see the cut on her hand?

A. No. She was lying face down on the ground. I didn't have a chance to look at her hands.

Q. So she is face down the entire time?

A. Until the paramedics arrived.

Q. Now, why is it that you were unable to see her hands?

A. Number one, she was lying on the ground.

Q. Well, you just described her with the hands out?

A. Right. However, I was helping treat the wound on her head, so I wasn't really concerned in looking or examining her hands. It wasn't important to me.

Q. Finding other injuries that she may have sustained was not important to you?

A. The head wound was life threatening, a lot of blood. I needed to stop the blood flow. If her hand was chopped off, I would have noticed, but it wasn't.

Q. Did she mention to you that she had a cut on her hand?

A. No, she did not.

Q. Did you ask her whether or not she had any other injuries?

A. No, I did not.

Q. Now, did you prepare an incident report in this matter?

A. Yes, I did.

Q. And the purpose of an incident report is what, Officer?

A. Incident report is explaining the crime scene, what witnesses stated, basically detailing the crime, what happened.

Q. And you know how important it is to get all of the critical facts down in that report; correct?

A. Yes, I do.

Q. The statement "I'm going to kill you, bitch," is that a critical fact to you?

A. To me, it is.

Q. Yet, you didn't include that in your report; did you?

A. I believe it is in there.

Q. Would it refresh your recollection to take a look at your report?

A. It probably would.

Q. I'm sorry?

A. It might.

MR. DAVIS: Your Honor, may I approach the witness?

THE COURT: Sure can.

Are you going to mark that for identification only?

MR. DAVIS: Please, page four of five.

THE CLERK: Defendant's A is marked for identification.

(Defendant's Exhibit A marked
for identification)

BY MR. DAVIS:

Q. Officer Salazar, let me show you what's been marked for identification as Defendant's A. I direct your attention to the fourth paragraph.

Have you had an opportunity to review that?

A. Yeah.

Q. You didn't include in there anywhere the statement, "I'm going to kill that bitch"; did you?

A. The "all right, bitch" was included in there.

Q. Officer, the question —

THE COURT: I didn't hear the answer. What was the answer you said?

THE WITNESS: I had wrote in my statement, "All right, bitch, I got something for you." That's the statement I wrote in there.

BY MR. DAVIS:

Q. You did not put in your statement what you considered to be a critical statement, that is, "I'm going to kill you, bitch"; did you?

A. That's right.

MR. DAVIS: Nothing further.

THE COURT: Any redirect?

MR. BRASS: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. BRASS:

Q. Officer, when you wrote your report, this was right after you had reported to 215 Blythdale; right?

A. Yes.

Q. Your memory of the event when you wrote the report, was it better when you wrote it, or is it better today?

A. That night when I wrote it.

Q. Okay. So now, having refreshed your recollection by looking at the report, do you recall what it was that victim Alexander told you regarding what the defendant said to her?

A. Yes.

Q. And which statement was it?

A. "All right, bitch, I got something for you."

Q. And when you testified on direct about him saying, "Bitch, I am going to kill you," was that your interpretation of this statement?

A. Yes, it is.

MR. BRASS: Nothing else.

RECROSS-EXAMINATION

BY MR. DAVIS:

Q. So, Officer, rather than coming in before this jury and setting forth what happened, you feel free to come in and interpret statements and facts?

A. No, I do not.

Q. Were you confused by the question that was asked to you on direct examination?

A. I can't say that I was confused. I might have quoted that statement wrong, but basically it's the same thing, in my opinion.

Q. So you would add a little extra in your interpretation?

A. No, I wouldn't add a little extra at all. I thought that's what he said.

Q. So your recollection of the facts is not as good today as it was at the time?

A. What I wrote in the report is fact.

Q. I'm asking you whether or not your recollection of the facts today is as good as it was at the time that you responded to the incident.

A. Oh, definitely being at the scene at the time and writing the report, I would have to say my facts would be more clearer then.

MR. DAVIS: Thank you.

THE COURT: Anything further?

MR. BRASS: I have nothing else.

THE COURT: Thank you, Officer. You're excused.

(Witness excused)

THE COURT: Next?

MR. BRASS: May I have a moment, Your Honor?

THE COURT: Yes.

(Pause in proceedings)

MR. BRASS: Your Honor, may we approach?

THE COURT: Sure.

(Side bar conference heard, not reported)

THE COURT: Ladies and gentlemen, the district attorney has — there is a witness that was supposed to be here and has not arrived, and they have to make a call to see what the problem is.

I don't like to do this. It's not my practice. But I'm going to take a 20-minute recess until 10:00 o'clock. Okay? Please come back at 10:00 o'clock.

(Recess taken at 9:40 a.m.)

(Proceedings resumed at 10:01 a.m.)

(The following proceedings were heard in the presence of the jury)

THE COURT: Go ahead, Mr. Brass.

MR. BRASS: Your Honor, the People would recall Officer Salazar to the stand.

THE COURT: Officer Salazar is recalled to the stand. You're still under oath.

JOSEPH SALAZAR

Recalled as a witness by the People, being previously duly sworn, testified further as follows:

THE COURT: You're asking to reopen your direct examination of him; is that correct?

MR. BRASS: That's correct, Your Honor.

THE COURT: Okay.

DIRECT EXAMINATION

BY MR. BRASS:

Q. Officer Salazar, you previously told us that you spoke to Ms. Gloria Persons at the scene?

A. Yes, I did.

THE COURT: Gloria Persons is, again, the mother of the person who was laying on the floor; right?

BY MR. BRASS:

Q. Officer?

A. Yes.

Q. When you spoke to her — when you first arrived at the scene, did you see her there?

A. Yes, I did.

Q. Could you describe her demeanor when you arrived?

A. Very concerned. She was helping, trying to treat her daughter's wound to the head. That's about it.

Q. Did she seem emotional?

A. Not overly emotional. She looked very concerned about the injury to her daughter's head.

Q. Did you have a conversation with her about what had occurred?

A. Yes, I did.

Q. Did she tell you that she saw something occur?

A. Yes.

Q. What did Ms. Persons tell you that she saw?

A. She saw —

MR. DAVIS: Objection.

THE COURT: Objection, hearsay. The exception is?

MR. BRASS: 1240.

THE COURT: Okay. I'll allow it.

THE WITNESS: She had told me that she had saw Mr. Davis hit her daughter in the head with a hammer.

BY MR. BRASS:

Q. Did she tell you how it was that this occurred?

A. Yes, she did.

Q. What did she tell you was the first thing that she heard?

A. She heard — she was upstairs. She heard some arguing downstairs. It sounded like it was her daughter and her boyfriend, Davis.

She then heard a slap. She heard her daughter cry out to her.

Q. What did her daughter say when her daughter cried out?

A. She said, like, "Mama, call the police."

Q. And what did Ms. Persons do in response to that cry?

A. Came downstairs, saw the two arguing —

Q. And when she saw the two arguing, what did she see take place?

A. She said she tried to separate them, and then upon doing that, she said she saw Davis hit her daughter in the head with a hammer.

Q. Okay. When she said she tried to separate them, did she tell you where she was standing? Where was Ms. Persons standing and trying to separate them?

A. I don't recall.

Q. Before Mr. Davis hit Ms. Alexander with a hammer, did he make any other physical contact with her, according to what Ms. Persons told you?

A. I can't recall at this time.

Q. Would looking at your report refresh your recollection?

A. Yes.

Q. Have you read your report, Officer?

A. Yes.

Q. Is your recollection refreshed?

A. Yes.

Q. According to what Ms. Persons told you, before Mr. Davis hit Ms. Alexander with the hammer, did he make any other physical contact with her?

A. No.

Q. Doesn't it say in your report —

MR. DAVIS: Objection, leading.

THE COURT: Are you going to impeach your witness?

MR. BRASS: I am, Your Honor.

THE COURT: Okay. Lay your foundation. Go ahead.

BY MR. BRASS:

Q. Officer, that is the report you wrote; correct?

A. Yes, it is.

Q. And in that, you detail the statement given to you by Ms. Persons; is that right?

A. Yes.

Q. Is your report accurate?

A. Yeah.

Q. At some point in the report that you're looking at right now, is there mentioned that Ms. Persons tells you —

MR. DAVIS: I'm going to object. It's hearsay.

THE WITNESS: I was reading the wrong paragraph.

THE COURT: Excuse me.

Have you read the report in full? Would that help you to take some time out to read the document before you start answering questions?

THE WITNESS: Well, I feel comfortable now that I've —

THE COURT: You feel comfortable now?

THE WITNESS: Yes, I do.

THE COURT: Okay. He feels comfortable now. Ask him the question again.

BY MR. BRASS:

Q. Officer Salazar, did Ms. Persons tell you whether the defendant made physical contact with Ms. Alexander before he hit her with the hammer?

A. Yes.

Q. And in what way did he make physical contact with her?

A. He had pushed her.

Q. And when he pushed her, what was the result of that push?

A. She fell towards the couch.

Q. Did she fall onto the couch?

A. Yes.

Q. And is it then that Mr. Davis hit her with the hammer?

A. Yes.

MR. BRASS: I have nothing else.

CROSS-EXAMINATION

BY MR. DAVIS:

Q. When was it that you spoke with Ms. Persons?

A. At the scene.

Q. When you first arrived at the scene?

A. Yes, I did.

Q. Well, it's not actually when you first arrived at the scene; is it? You went to the scene; then you left; you went back to the scene?

A. I initially talked to her, right at the beginning of the scene. And, yes, I did come back.

Q. Okay. Well, showing you your report —
May I approach the witness, Your Honor?

THE COURT: Yes.

BY MR. DAVIS:

Q. — do you agree the — let me direct your attention to the third paragraph in your report.

THE COURT: This is Exhibit A again?

MR. DAVIS: Exhibit A, I'm sorry, yes.

Q. Immediately prior to your eliciting the statement that you just gave, doesn't it say, "upon your return to the scene"?

A. Yes, it does.

Q. So you didn't talk to her when you initially got to the scene, you talked to her after you returned; correct?

A. No, I talked to her in the beginning when I first got there and also when I returned.

Q. But the statement that you got from her was upon your return to the scene?

A. Yes, it was.

Q. When was that?

A. When I returned to the scene, after looking for Mr. Davis.

Q. How much time elapsed?

A. Ten minutes.

Q. The statement that you got from Ms. Persons, was that also based on questions that you posed to her?

A. Yes.

Q. And she was answering the questions?

A. Yes, she was.

Q. Did you ask her whether or not she had seen the knives?

A. No, I did not.

Q. Did you ask her whether or not she saw Ms. Alexander go after Mr. Davis with the knives?

A. No, I did not.

Q. Did you ask her whether or not she had consumed any alcohol?

A. No, I did not.

Q. Did you ask her whether or not she had smoked any crack cocaine?

A. No, I did not.

Q. Whether or not she had ingested any narcotics?

A. No, I did not.

Q. So you didn't ask her any questions about what led up to Miss Alexander being hit over the head with a hammer; correct?

A. No, I did not.

Q. Did you smell alcohol on her breath?

A. No.

Q. And Ms. Persons said that it was only one hit to the head with the hammer; correct?

A. Yes.

Q. And then after Ms. Alexander fell to the couch, that was the end of it?

A. Yes.

MR. DAVIS: Thank you. That's all I have.

MR. BRASS: If I may have this marked, a photograph, marked as People's Exhibit 1-A — there are three of them — 1-B and 1-C for identification.

THE CLERK: People's Exhibits 1-A, 1-B, and 1-C are marked for identification.

(People's Exhibits 1-A, 1-B and 1-C marked for identification)

MR. BRASS: Thank you.

REDIRECT EXAMINATION

BY MR. BRASS:

Q. Officer, I'm going to show you what's been premarked for identification as People's Exhibit 1-A. Do you recognize what's depicted in that photograph?

A. Yes, I do.

Q. And what is depicted in the photograph?

A. The victim that I helped that night that was hit in the head with the hammer, Ms. Alexander.

Q. Do you see anything unusual about her appearance in that picture?

A. She's got a big bandage on the top of her head.

Q. Is that bandage in the same location as where you saw her injury?

A. Approximately, yes.

Q. I'm going to show you People's Exhibit 1-B also. Do you recognize what's depicted in that photograph?

A. The victim lying in her hospital bed, it looks like.

Q. And I'm going to show you one more picture. Is that also a picture of Ms. Alexander, Exhibit 1-B?

A. Yes, it is.

Q. And this is People's Exhibit 1-C. Do you recognize what's depicted in that photograph?

A. Yes. The top of Ms. Alexander's head, with a bandage on her wound.

Q. Aside from the bandage, do you see anything else that's unusual about the appearance of her head?

A. Her hair seems caked with a lot of blood.

Q. Anything else aside from that? Do you notice any swelling?

A. Around her left eye, there may be some swelling.

MR. BRASS: The People would move People's Exhibits 1-A, 1-B and 1-C into evidence.

THE COURT: Okay. In evidence.

(People's Exhibits 1-A, 1-B and 1-C received in evidence)

MR. BRASS: May I publish them to the jury, Your Honor?

THE COURT: At the end of the case, you can. I don't usually do that during the taking of evidence.

MR. BRASS: I have nothing else.

THE COURT: Any recross?

MR. DAVIS: No.

THE COURT: Thank you, Officer. You're excused.

(Witness excused)

THE COURT: Next witness.

MR. BRASS: If I may have just a moment, Your Honor?

(Pause in proceedings)

MR. BRASS: Your Honor, the People call Carrie Korelec to the stand — she will be present momentarily — Chryse Hawes, Your Honor, the custodian of records — I apologize — to the stand.

CHRYSE HAWES

Called as a witness by the People, being duly sworn, testified as follows:

THE CLERK: Please be seated. Please state your name and spell it for the record.

THE WITNESS: Chryse Hawes, C-H-R-Y-S-E, H-A-W-E-S.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. BRASS:

Q. Good morning, Ms. Hawes.

A. Good morning.

Q. What is your occupation?

A. I'm the records custodian for the San Francisco Police Department.

Q. What does a records custodian for the San Francisco Police Department do?

A. We maintain custody of all the tapes and incoming calls, C.A.D. Records that come into the communication division of the police department.

Q. You said C.A.D. tapes. What are those?

A. Computer-assisted dispatch tapes. All calls that come into communications are recorded on a 24-hour reel, and we make the cassette tapes from the master reel.

Q. So if a person calls 911, that call is taped?

A. Yes.

Q. And you keep the tapes?

A. Yes.

MR. BRASS: If I may?

I'm going to ask that this tape be marked as People's Exhibit 2.

THE COURT: People's 2 is a tape.

THE CLERK: People's 2 is marked for identification.

(People's Exhibit 2
marked for identification)

MR. BRASS: If I may have a moment to rewind the tape, Your Honor?

THE COURT: Sure.

MR. DAVIS: For the record, Your Honor, I have hearsay and 352 objections.

THE COURT: Do you want to lay a foundation as to if she heard this tape, it's identified that this is something that she has some familiarity with?

MR. BRASS: In a moment, I will lay a foundation.

THE COURT: You might lay a foundation this tape got created by her or somebody else, to her knowledge.

BY MR. BRASS:

Q. Ms. Hawes, do you receive requests for tapes?

A. Yes.

Q. And when you receive a request for a tape, how do you respond to the request?

A. We make a printout of the computer-assisted dispatch and then we locate the telephone call on the master reel and proceed to make a copy of that on a cassette tape.

Q. And on the master reel, is that the original tape recording of the phone call that came in?

A. Yes.

Q. And when you make a copy of part of that master tape, that original of that phone call, do you normally introduce that on the copy of the master reel?

A. Well, we have a heading that we use at the beginning of the tape. This we do on all cassettes that we make.

Q. And what is that heading? Do you know that?

A. Yeah. "This is Chryse Hawes, custodian of records for the San Francisco Police Department. Today's date is," and I state the date. "And the following recordings have been taken from police tapes dated," and then you give the date that you're taping from.

Q. Is that the standard way of preparing a copy of a C.A.D. tape?

A. Yes.

THE COURT: And this is done in the ordinary course of business?

THE WITNESS: Yes.

THE COURT: And you're relying on this procedure being implemented in this case in your testimony today?

THE WITNESS: Yes.

BY MR. BRASS:

Q. I'm going to ask you if you recognize your voice on this tape. This is People's Exhibit 2.

(Whereupon, tape played)

MR. BRASS: I appear to have entered the wrong tape, Your Honor. If I may have just a moment?

This is People's Exhibit 2.

THE CLERK: People's Exhibit 2-A is marked.

(People's Exhibit 2-A
marked for identification)

BY MR. BRASS:

Q. Ms. Hawes, I'm going to play the introduction to this tape, and please tell me if you recognize the voice of the person on the tape.

(Whereupon, tape played)

BY MR. BRASS:

Q. Do you recognize that person?

A. Yes.

Q. Who is that person?

A. Me.

Q. I'd like you to hear this whole introduction, actually.

(Whereupon, tape played)

BY MR. BRASS:

Q. Is that your standard introduction for a copy of a C.A.D tape?

A. Yes.

Q. Is this record kept by you?

A. Yes.

Q. Is it kept by you in the ordinary course of your business?

A. Yes.

Q. And did you produce this copy in the ordinary course of your business?

A. Yes.

THE COURT: You produced it off the master reels?

THE WITNESS: Yes.

THE COURT: Okay. I find sufficient foundation for the playing of the tape. And the 352 objection is not sustained. It's a business record. So therefore, it's admissible.

Is it stipulated the court reporter doesn't have to take down the playing of the tape; the tape itself would satisfy that issue?

MR. BRASS: The People will stipulate.

MR. DAVIS: So stipulated.

THE COURT: Okay; thanks.

(Whereupon, Exhibit 2-A, a tape, was played)

MR. BRASS: The People would move People's Exhibit 2-A into evidence.

THE COURT: Yes. That will be received.

(People's Exhibit 2-A
received in evidence)

MR. BRASS: I have nothing else.

THE COURT: Thank you.

Cross-examination?

MR. DAVIS: No.

THE COURT: Thank you, Ms. Hawes.

THE WITNESS: You're welcome.

(Witness excused)

THE COURT: Anything else?

MR. BRASS: Nothing else, Your Honor.

THE COURT: All right. People rest?

MR. BRASS: Well, Your Honor, we do have another witness, Dr. Grant Gauger. He's not available until tomorrow.

THE COURT: Yes.

MR. BRASS: Absent that, the medical records for Ms. Alexander have been subpoenaed to this court pursuant to evidence code sections 1560, 1562 and

1271. They were brought to this courtroom sealed from San Francisco General Hospital from the custodian of records, Eugene Perez. I would ask that those be admitted into evidence.

THE COURT: Any objection?

MR. DAVIS: Certain portions of them —

THE COURT: We can take that up.

MR. DAVIS: Yeah.

THE COURT: But generally speaking, the bulk of the documents, there is no objection to?

MR. DAVIS: Correct.

THE COURT: Then the medical record will be marked as People's 3 for identification. There is the proper certification as to their admissibility for foundational purposes, and therefore, subject to particular objections to portions, the medical records will be received.

(People's Exhibit 3
marked for identification)

(People's Exhibit 3
received in evidence)

THE CLERK: People's 3 is marked for identification.

MR. BRASS: The People would ask the Court for an opportunity to bring in Dr. Gauger.

THE COURT: I'll take it under submission.

Go ahead.

Otherwise, you rest; right?

MR. BRASS: Otherwise, I rest, Your Honor.

THE COURT: All right. Do you want to contact somebody, Mr. Davis?

MR. DAVIS: Yes, if I could have a few minutes, Your Honor.

THE COURT: How much time do you need?

Ladies and gentlemen, this case is going to be over a lot faster than four days, I'm telling you right now. So don't be annoyed by the gaps. It looks to me like this case will be submitted to you tomorrow.

MR. DAVIS: 15 minutes?

THE COURT: 15 minutes.

Ladies and gentlemen, because of the speed this case is moving, I'm going to give him 15 minutes to get his next witnesses in. I'm sure you understand why. Like I said, tomorrow you'll be getting this case to decide.

It's also my practice that once you serve on a jury, you're excused for the remainder of your two weeks from any further jury service. So in some ways, you're benefiting by this procedure that we're moving so quickly. So I appreciate that.

Okay? Take 15 minutes. All right.

(Recess taken at 10:26 a.m.)

(Proceedings resumed at 10:42 a.m.)

(The following proceedings were heard in the presence of the jury)

THE COURT: Go ahead, Mr. Davis.

MR. DAVIS: Thank you.

OPENING STATEMENT

MR. DAVIS: Good morning, ladies and gentlemen. This is my opportunity to give you a map of what the evidence is going to show, and in this particular case, what the evidence is not going to show.

You are going to hear from a couple of witnesses who are going to give you an overall picture of what transpired at 215 Blythdale on February the 1st, 1998.

First, we're going to hear from assistant district attorney Tony Brass, who is going to tell us of a conversation that he had with Miss Ella Alexander, wherein Ms. Alexander explained to him that this was nothing more than a drunken accident and that she did not want this to go any further.

We are then going to hear from an investigator that spoke with Miss Alexander and received a detailed statement from her regarding what transpired. He is going to indicate that she told him that on the night in question, she and Mr. Davis were sitting in their home, sitting in her home, at 215 Blythdale, drinking Old English 800, that they had consumed somewhere between three and four 40-ounce bottles of Old English 800.

Thereafter, a friend of hers by the name of Rolanda came over. They continued playing dominoes and they continued drinking three or four more 40-ounce bottles of Old English 800.

They then got into an argument, "they" being Mr. Davis and Miss Alexander. At that point, the friend, Rolanda, left.

Mr. Davis went upstairs. As he's gone upstairs, Ms. Alexander arms herself with three knives from the kitchen. She picks up three knives. She puts one on either side of her pants; she puts a third one in her left sock.

As Mr. Davis returns from upstairs, Miss Alexander goes after him with a knife in each hand. The third one falls out, but she goes after him with two knives.

In an effort to defend himself, he picks up a hammer, attempts to knock the knives out of her hands. She receives a cut on one of her thumbs from the knife that she was holding. She continues swinging the knives at him; he continues swinging at the knives with the hammer. He accidentally hits her in the head. She falls to the couch. She's laying there. He's standing over her, saying, "Get up, get up, oh, my God, what have I done?"

You're also going to hear that Ms. Gloria Persons, Ms. Alexander's mother, was upstairs when all of this took place, and not in a position to see anything.

After you hear this, you're going to get the entirety of the picture, and at that point, we're going to ask you to return verdicts of not guilty. Thank you.

THE COURT: Call your first witness.

MR. DAVIS: Call Anthony Brass to the stand.

MR. BRASS: Your honor, Wade Chow will stand in as the district attorney during my examination.

THE COURT: Okay.

ANTHONY BRASS

Called as a witness by the defendant, being duly sworn, testified as follows:

THE CLERK: Thank you. Please be seated.

Please state your name and spell it for the record.

THE WITNESS: Anthony Brass, A-N-T-H-O-N-Y, last name B-R-A-S-S.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. DAVIS:

Q. Good morning, Mr. Brass.

A. Good morning.

Q. How are you employed?

A. I am an assistant district attorney for the City and County of San Francisco.

Q. And how long have you been so employed?

A. Since September of 1995.

Q. Were you assigned a case involving a defendant by the name of Anthony Davis and an alleged victim by the name of Ella Marie Alexander, court number 170421?

A. Yes.

Q. And subsequent to that assignment, did you have a conversation with Miss Alexander?

A. Yes.

Q. When was that conversation?

A. I don't recall the exact date.

Q. But it was sometime after February 1st of 1998; correct?

A. Yes, it was substantially after February the 1st of 1998.

Q. Who initiated that conversation?

A. Ms. Alexander did.

Q. And how did she do that?

A. She called me on the telephone.

Q. What is it Ms. Alexander told you during the course of that conversation?

A. She informed me that she wanted to drop the charges against Mr. Davis.

Q. And did she tell you why she wanted to drop the charges against Mr. Davis?

A. She said that the whole thing was a drunken accident.

Q. You have requested Miss Alexander's appearance at a number of proceedings; correct?

A. Yes.

Q. And you've done that through the issuance of subpoenas?

A. That's correct.

Q. And she has steadfastly maintained her position that she did not want to come forward; correct?

A. I can only assume.

Q. Has she appeared?

A. No.

Q. Thank you. That's all I have.

CROSS-EXAMINATION

BY MR. CHOW:

Q. Mr. Brass, could you tell the jury, do you recall when you were assigned this case?

A. I was assigned this case — it was after February 1st of 1998, a few weeks after that.

Q. And in the course of that, you indicated that you had a conversation with Ms. Alexander, the victim in this case; is that correct?

A. That's correct.

Q. And you said that was several months after the initial assignment in this case; is that right?

A. That is right.

Q. Prior to actually having this conversation that she initiated, had you attempted to contact her yourself?

A. Yes, I had.

Q. And do you know how many times?

A. Many times, too numerous to count, more than 25 times.

Q. And would that have been upon — did you begin that upon being assigned this case?

A. Almost immediately upon being assigned the case.

Q. Did she have an answering machine?

A. Not that I recall.

Q. And did you ever receive any messages from her except for this one that you actually spoke with her?

A. I have never received a message from her.

Q. Now, when you spoke to her in this telephone conversation that Mr. Davis referred to, you indicated that she simply wanted to drop the charges and that the basis for this was that it was a drunken accident; is that right?

A. Yes. She called and told me that she was just calling to drop the charges, and when I asked why, she responded, “Because the whole thing was a drunken accident.”

Q. Now, when you got that information, did you attempt to find out more?

A. I did.

Q. Why did you attempt to find out more?

A. I wanted to know details of how this accident took place. I wanted to get to the bottom of what happened and why she was calling it a drunken accident.

Q. And did this seem odd to you, that this would have been the result of a drunken accident?

A. It did, because it was inconsistent with her prior statements, and the nature of the injury seemed like it was not caused by a drunken accident.

MR. DAVIS: Objection.

THE COURT: Objection on what grounds?

MR. DAVIS: Withdrawn.

BY MR. CHOW:

Q. Now, was this simply inconsistent with Ms. Alexander’s statement, or was it inconsistent with other things?

A. It was inconsistent with Ms. Persons’ statement. According to the police report, she had witnessed the incident —

MR. DAVIS: Objection, hearsay.

THE COURT: Okay. He’s testified. A statement of Ms. Persons has gone in. So next question. He said it was inconsistent.

BY MR. CHOW:

Q. Now, when you concluded that you wanted some more information, what did you ask her?

A. I asked her what she meant by it being a drunken accident.

Q. And what was her answer to you?

A. She says it was a drunken accident and would not go into any more detail.

Q. Did you ask her for more details?

A. I did.

Q. And you indicated she wouldn't provide any more?

A. That's correct.

Q. Was that the end of the conversation?

A. No.

Q. What else happened?

A. I asked her about perhaps other reasons why she might not be coming forward. Being familiar with domestic violence cases, I asked her —

MR. DAVIS: Objection, Your Honor, move to strike. May we approach?

THE COURT: Okay, you can approach.

(Side bar conference heard, not reported)

THE COURT: Next question.

The question is withdrawn, I take it; is that right?

MR. CHOW: That's right, Your Honor.

Q. Now, Mr. Brass, did you attempt to contact Ms. Alexander after this telephone conversation?

A. Yes.

Q. And how many times would you say you tried to contact her on those terms?

A. My efforts changed because her phone was disconnected. There was no other phone number listed for her.

So I was sending out investigators to her residence, and I did that on, I would estimate, about a dozen times.

Q. And did you ever receive any contact from her after you sent those investigators out?

A. No. Actually, I'm misstating the facts. She did meet with me once, several weeks after that initial phone call.

Q. And do you remember about when that took place?

A. Approximately five weeks ago.

Q. And that was a face-to-face meeting; is that right?

A. Yes.

Q. And what happened during that meeting?

MR. DAVIS: objection, relevance, hearsay.

THE COURT: Well, it seems to me it's hearsay as to what happened, what was said, and I don't know what the exception is, if there is any.

MR. CHOW: That's fine, Your Honor. I'll withdraw that question.

You know, I don't have anything further for this witness.

THE COURT: Okay. Any redirect?

MR. DAVIS: No.

THE COURT: Thank you, Mr. Brass. You can step down.

(WITNESS EXCUSED)

THE COURT: Okay. Next?

MR. DAVIS: At this time, I'd call Nigel Phillips to the stand.

NIGEL PHILLIPS

Called as a witness by the defendant, being duly sworn, testified as follows:

THE CLERK: Please be seated. Please state your name and spell it for the record.

THE WITNESS: Nigel Phillips, N-I-G-E-L, Phillips, P-H-I-L-L-I-P-S.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. DAVIS:

Q. Mr. Phillips — good morning, Mr. Phillips.

A. Good morning.

Q. How are you employed?

A. I'm an investigator for the public defender in San Francisco.

Q. How long have you been so employed?

A. Two years now.

Q. And what would you say are your job duties?

A. Interviewing victims, witnesses, people involved in crimes, taking statements, making reports, testifying in court, taking photographs of crime scenes.

Q. Did you interview an individual by the name of Ella Alexander in this case?

A. I did.

Q. Did Ms. Alexander call you?

A. Yes, she did.

Q. When was that interview conducted?

A. July 9th, around about 4:30 p.m.

Q. And what was the subject matter of the discussion?

A. She told me that she wanted to make a change to her prior statements concerning an incident that took place at 215 Blythdale.

Q. And did she tell you what happened on February 1st?

A. Yes, she did.

Q. What did she tell you?

A. She told me that she was at home drinking with the defendant. She had had three or four 40 ounces. A friend came over, Rowanda (sic), and they drank three or four more.

Q. 40 ounces?

A. 40 ounces.

Q. 40 ounces of what?

A. Malt liquor.

And then the defendant and Ella got into an argument. So Rowanda left.

At that point, the defendant went upstairs, and Ella went to the kitchen and took out three knives from the drawer and placed those —

Q. Did she tell you what she did with the three knives?

A. Yeah. She placed one knife on either side in her belt loops here (indicating), or through her belt.

Q. Would you stand up, please?

A. Yeah, sure. I'll demonstrate for you. Sort of through here (indicating).

Q. Pointing to the belt on the side of your pants?

A. Um-hum —

Q. Yes?

A. — putting the knife in there, one here, and one on this side (indicating), and one in her left sock.

Q. And then what happened after that?

A. The defendant came back downstairs and they were still arguing, and she started thrusting at him with the knives. She had two knives in her hand. She took two knives out of her belt loop and had them in both hands.

Q. And you said she started thrusting at him?

A. She told me she was thrusting and slashing at the defendant.

Q. Okay. What part of his body was she —

A. She said the whole face, neck area.

Q. And at the time that she began thrusting at him with these knives, did he have anything in his hands?

A. No.

Q. What happened next?

A. He told me that —

Q. Oh, by the way, before you answer that question, did she tell you where Ms. Persons was at that time?

A. Sorry?

Q. Did she tell you where her mother was at this time?

A. Her mother? She told me that her mother was upstairs.

Q. What happened after she began thrusting at him with these knives?

A. She told me the defendant grabbed the hammer. She couldn't describe the hammer for me. But he grabbed the hammer, in an effort to defend himself. And he was trying to knock the knife out of her hand, she told me.

And at that point, she said, you know, during all that melee, the hammer slipped and hit her on the head.

Q. What happened to the third knife?

A. She didn't tell me.

Q. Did she indicate to you whether or not she at any time lost consciousness?

A. No. She said, "I wasn't unconscious," she told me.

Q. Now, after she was hit in the head with the hammer, did she say what happened?

A. She said she was on the floor, I believe, in front of the couch. And the defendant was looking over at her saying, "Oh, my God, what have I done," and then he panicked and left.

Q. Did Miss Alexander indicate to you anything regarding her thumb?

A. She told me that it was during the attempt by the defendant to defend himself from the knives that he hit the hand first and then the head, or at the same time. She didn't quite know.

Q. But she indicated that she had a cut on her thumb?

A. Yeah.

Q. Did she tell you when it was that her mother came downstairs?

A. I believe it was after everything had happened, and then she called 911.

MR. DAVIS: Thank you. That's all I have.

THE COURT: Cross?

MR. BRASS: Yes, Your Honor. Thanks.

CROSS-EXAMINATION

BY MR. BRASS:

Q. You have been an investigator two years?

A. Um-hum.

Q. And you told us that Ms. Alexander had a lot to drink that night?

A. She told me that she had had three or four 40 ounces before her friend arrived, and after her friend arrived, three or four more.

Q. Three or four more?

A. Um-hum.

Q. So she could have had up to eight 40 ounces?

A. That's what she told me.

Q. That's a lot of alcohol; isn't it?

A. It sounds like it, yeah.

Q. So when she was telling you the details of what happened that night —

A. Um-hum.

Q. — she probably didn't remember every detail; right, because she was really drunk when this happened?

A. I don't know.

MR. DAVIS: Objection. This calls for speculation.

THE WITNESS: I was going to say — sorry.

THE COURT: Sustained.

BY MR. BRASS:

Q. Now, she took out three knives; right?

A. Um-hum. That's what she told me.

Q. And she went to slash at the defendant's neck and face area?

A. Um-hum, yes.

Q. Did she tell you why?

A. Because of the argument.

Q. So during the course of the argument, she armed herself and went after his neck and his face; is that right?

A. That's what she told me.

Q. Did she tell you whether she intended to actually cut his neck or face?

A. She didn't tell me that.

Q. Okay. Now, when she was struck on the head, she told you the hammer slipped; is that right?

A. Yeah.

Q. It slipped out of the grip of Mr. Davis?

A. No. She — I think she was telling me that during the process of the defendant defending himself from the knife —

Q. Let me stop you for a second. Do you think that's what she told you, or do you know? I'm asking you what she told you. So I don't want you to interpret her words.

A. Okay. She said it slipped.

Q. It slipped?

A. Went out of his grip.

Q. She said that the hammer slipped?

A. Right.

Q. And in whose grip was the hammer?

A. The defendant.

Q. So Mr. Davis had the hammer in his hand?

A. Um-hum.

Q. So she's telling you she got hit in the head while the hammer was in Mr. Davis' hand?

A. Um-hum.

Q. Okay. Is that a "yes"?

A. Yes.

Q. We need to say "yes" or "no" for the reporter.

A. I understand.

Q. Did she tell you whether, on February 1st, Mr. Davis and her lived together?

MR. DAVIS: Objection.

THE WITNESS: No, she didn't.

THE COURT: Sustained.

BY MR. BRASS:

Q. When she went after the defendant, did she tell you whether the defendant had hit her already?

A. No, she didn't.

Q. So she didn't tell you that Mr. Davis had struck her in any way?

A. No.

Q. Okay. And she told you that Mr. Davis had nothing in his hands?

A. At which point?

Q. At the point when she first armed herself and went after his neck and his face.

A. That's correct.

Q. So he was unarmed?

A. Correct.

Q. According to her story?

A. Correct.

Q. And she has two knives?

A. Correct.

Q. And she went after his neck and face?

A. That's what she told me.

Q. Okay. Did she tell you whether she landed any blows on his neck and face?

A. No.

Q. She missed all those blows?

A. She didn't tell me that.

Q. Did she tell you whether Mr. Davis was drinking?

A. She told me that Mr. Davis and her were drinking initially three or four 40 ounces before her friend arrived.

Q. Did she tell you whether Mr. Davis was using any drugs that night?

A. She didn't tell me that.

Q. But the crux of her statement is that Mr. Davis was defending himself, and while defending himself, the hammer slipped and struck her on the head; that's her statement to you?

A. That's her statement.

Q. Did she tell you why she put a knife in her sock?

A. No.

Q. Did you ask her?

A. No.

Q. Did you ask her why she had so many knives?

A. No.

MR. BRASS: I have nothing else.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. DAVIS:

Q. Did she describe the knives to you?

A. Yeah. She told me they were kitchen knives that she used to cut chicken with.

Q. Did she describe in particular detail any —

A. She said one of the knives had some sort of — it was a very strange description — something was on the handle, but I couldn't really figure out what she was trying to tell me.

Q. Okay. Did she describe any of the blades on the knives?

A. She just told me they were standard kitchen knives, carving knives.

Q. Did she indicate to you that one of the knives had a ruffled —

A. That was the word, "ruffled," yeah.

Q. And that's a knife that she uses for what?

A. For cutting chicken.

Q. Now, you indicated that she said that the hammer slipped. You don't mean that it slipped out of his hand, just that it was an accident; is that what you're saying?

A. That was my —

MR. BRASS: Objection.

BY MR. DAVIS:

Q. What did she tell you?

THE COURT: Just tell us what you heard her say.

THE WITNESS: Okay.

THE COURT: No speculation, no surmising, no guesswork. Okay?

THE WITNESS: Okay. She told me that the hammer slipped while the defendant was attempting to hit her hand and then hit her head at the same time.

MR. DAVIS: Thank you.

That's all I have.

THE COURT: How tall is Ms. Alexander?

THE WITNESS: I'm sorry?

THE COURT: How tall is Ms. Alexander?

THE WITNESS: I don't know, Your Honor.

THE COURT: You didn't see her?

THE WITNESS: No.

THE COURT: This was all over the telephone?

THE WITNESS: Yes.

MR. BRASS: If I may, Your Honor?

THE COURT: Yes.

RECROSS-EXAMINATION

BY MR. BRASS:

Q. She called you on July 9th of 1998; correct?

A. Correct, yeah.

Q. This incident took place February 1st of 1998?

A. Yes.

Q. Did you ask her why it took her so long to call you?

A. No.

MR. BRASS: I have nothing else.

THE COURT: Thank you, sir. You may step down.

(Witness excused)

THE COURT: Anything further?

MR. DAVIS: Not at this time, Your Honor.

THE COURT: All right. Can I see counsel up here, please?

(Side bar conference heard, not reported)

THE COURT: Do that now. Okay?

MR. DAVIS: Okay.

THE COURT: Make sure you agree upon what it is.

(Pause in proceedings)

MR. DAVIS: Why don't we do that tomorrow, Judge.

* * *

AFTERNOON SESSION 1:10 P.M.

(The following proceedings were heard out of the presence of the jury)

MR. BRASS: Good afternoon, Your Honor. Do you want to call the case?

THE COURT: It's the case of People v. Anthony Davis. The jury is not present.

Go ahead.

MR. BRASS: Your Honor, it appears as though Mr. Leland Davis and I have reached a stipulation regarding the tape of the defendant's statement.

THE COURT: Okay. What are you going to say?

MR. BRASS: That stipulation will be that on the tape, the defendant stated to Inspector Petrie that both he and the victim were under the influence of alcohol and crack cocaine that night.

MR. DAVIS: Or drunk and had been smoking crack cocaine.

MR. BRASS: That's fine.

THE COURT: Were drunk and had been smoking crack cocaine.

Do you stipulate to that statement?

MR. DAVIS: So stipulated.

MR. BRASS: So stipulated.

THE COURT: Okay. Then that takes care of the tape.

MR. BRASS: One additional matter, Your Honor. This is the taped statement given by Ms. Ella Alexander to Inspector John Sanford.

THE COURT: Okay.

MR. BRASS: Under the same evidence code section which allowed Nigel Phillips to talk about a statement given to him by Ms. Alexander to impeach her other statement, I believe the People can now introduce a taped statement which is made prior to the statement given to Mr. Phillips and is completely inconsistent with that statement.

THE COURT: What does it say?

MR. BRASS: In that statement, Ms. Ella Alexander details to Sergeant Sanford what happened. She goes through — again, it's the level of detail in which she mentions never having had knives in her belt loops and her sock. The statement denies self-defense on the part of the defendant in swinging the hammer, and, rather, makes that an act which was done with purpose.

MR. DAVIS: I don't believe that 1202 covers that type of a statement, statements made and offered for that purpose. My understanding of 1202 is that it applies to statements that are being introduced that are inconsistent with the hearsay statement that was introduced in court.

THE COURT: I think so.

The problem we have is, is that 1202 talks in terms of impeaching the hearsay declarant's statement, which is being used at the trial. I found that the statement to Nigel —

MR. BRASS: Phillips.

THE COURT: — Phillips impeached the hearsay declarant's statement that was used at trial.

But what you're doing now is you're using the theory of a prior consistent statement to show that before she gave the impeaching statement to Phillips, she gave a consistent statement with her statement before to the police at the scene.

MR. BRASS: That's exactly correct, and I think I'm allowed to introduce a prior consistent statement —

THE COURT: I don't think you can, because, first of all, 1202 does not allow the statement to come in for the truth.

Under California law, a prior inconsistent statement comes in for the truth, under People versus Green. But it's only coming in to impeach. The cases hold that it does not come in for the truth, prior inconsistent statement.

MR. BRASS: It only comes in for the purpose of impeachment.

THE COURT: Impeachment only.

MR. BRASS: So prior consistent then becomes irrelevant; is that the Court's position?

THE COURT: Yes, yes, because you're just impeaching what she says, and that would allow you then to bring in other statements that are not admissible for various other reasons.

And the use note talks about the fact, the comment, under 1202, talks in terms of the impeachment that does not come in for the truth. It's basically a device to impeach a hearsay declarant. And People versus Beyea, which is a case I read last night — I'll put the cite on the record — basically in that case, People versus Beyea, which is at 38 Cal.App.3d 176, and also People versus Marquez, which is 88 Cal.App.3d 993, there is discussion about how 1202 is used. And it's not being used for the truth, but rather, for impeachment only.

As a matter of fact, an instruction has to be probably prepared that the prior inconsistent statements, unlike the normal jury instruction which tells the jurors that it can consider for the truth, when you're impeaching a hearsay declarant, it only comes in for purposes of impeachment.

MR. BRASS: Your Honor, in the alternative, I would seek to introduce Ms. Alexander's statement in rebuttal, under 1370.

THE COURT: What's it rebutting? Is it cumulative?

MR. BRASS: I don't believe so. It's rebutting the statement introduced by the defense through Mr. Nigel Phillips. The statement introduced by the People, the spontaneous statement, merely states that Anthony Davis was the one who swung the hammer, causing the injury, and that he made a threat or made a statement coupled with that.

There is a great deal more detail in the statement of all the incidents leading up to that fact. I have a transcript of it I could submit to the Court.

THE COURT: I'll look it over.

MR. BRASS: Would Your Honor wish to look at the transcript now?

THE COURT: I'll look at it between now and later, yes. I'm not going to sit and read it now, but I'll look it over.

MR. BRASS: One other matter.

THE COURT: Do you want to mark it?

MR. BRASS: Certainly

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TRANSCRIPT ON APPEAL

COURT OF APPEALS OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

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PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, v. ANTHONY T. DAVIS, Defendant/Appellant.	APPELLATE NO. A086104 SAN FRANCISCO CITY AND COUNTY NO. 170421 / 1769112

ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

THE HONORABLE ROBERT L. DONDERO, JUDGE

REPORTER'S TRANSCRIPT ON APPEAL
[**EXCERPTED**]

JULY 15, 1998

VOLUME 3

REPORTED BY: SARA LERSCHEN, CSR #6213, RMR, CRR

* * *

MR. BRASS: Your Honor, as part of the rebuttal case, the People would call Sergeant John Sanford to the stand.

JOHN SANFORD, JR.

Called as a witness by the plaintiff, being duly sworn, testified as follows:

THE CLERK: Please be seated. Please state and spell your name for the record.

THE WITNESS: John Sanford, Junior, S-A-N-F-O-R-D.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. BRASS:

Q. Good morning, Sergeant Sanford.

A. Good morning.

Q. What is your occupation?

A. I am a sergeant of police for the City and County of San Francisco.

Q. And for how long have you been so employed?

A. For 13 years.

Q. And what are your current duties now?

A. I'm currently assigned to the domestic violence unit as an investigator.

Q. And for how long have you been assigned to the domestic violence unit?

A. For almost two years now.

Q. Tell the jury: what does a sergeant with the domestic violence unit do?

A. A sergeant in a domestic violence unit is basically responsible for investigating all domestic violence-related crimes, and doing rebookings and domestic violence-related cases, and also doing what's called warrant workups, where the suspect is not in custody, where we will investigate the case and have a warrant issued for the arrest of the suspect.

Q. On February 1st of 1998, were you assigned a case in which a victim named Ella Alexander was a witness?

A. Yes, I was.

Q. And did you investigate that case?

A. Yes, I did.

Q. And what steps did you take to investigate that case?

A. Well, right away, I was actually called at home, because it was a serious incident that had occurred, and I was the on-call investigator.

So once I was called and notified of the incident, then I took some preliminary steps by notifying the district station and our operation center here at 850 Bryant Street.

Q. And what steps did you take to investigate this case during February 1st of 1998?

A. My initial step was to respond to the hospital and conduct an investigation out there by interviewing the victim in the case.

Q. What hospital was that?

A. That was San Francisco General Hospital.

Q. And when you went there, was the victim there?

A. Yes, she was.

Q. Was she a patient there?

A. Yes.

Q. And when you saw her in the hospital, could you describe her appearance?

A. Yes. She was on the gurney. She was laying down. She had visible trauma to her head.

And at that time, she was being moved from the trauma room transport — they were escorting her upstairs to, I believe it was 4-B.

MR. DAVIS: Objection, speculation.

THE COURT: Sustained as to where they were going.

BY MR. BRASS:

Q. Sergeant Sanford, were you present when some photographs were taken of Ms. Alexander?

A. Yes, I was.

Q. I'm going to show you what's been entered into evidence as People's Exhibit 1-A. Do you recognize what's depicted in that photograph?

A. Yes, I do.

Q. And what is depicted in that photograph?

A. This is a photograph of Miss Alexander at the hospital, and this was taken by our photo lab inspector.

Q. And were you present when that was taken?

A. Yes, I was.

Q. Do you notice anything unusual about Miss Alexander's appearance?

A. Well, as I stated earlier, I noticed the obvious injury to her head, with the tape on it.

Q. Okay. And in what way was it obvious aside from the tape?

A. Well, I could see blood, dried-up blood around her hair and actually on the bandage itself.

Q. Was Miss Alexander conscious when you saw her?

A. Yes, she was.

Q. Did you speak with her?

A. Yes, I did.

Q. And did you take any steps to memorialize your conversation with Ms. Alexander?

A. Yes, I did.

Q. What steps did you take?

A. I took a taped statement from her.

Q. And do you have that tape with you today?

A. Yes, I believe so.

Q. May I see the tape, Sergeant?

A. Sure.

Q. Sergeant, how do you know that this is the tape of the interview with Ms. Alexander?

A. Because once I took the tape out of my tape recorder, I made a note on the tape itself with the case number and the victim name, as depicted here.

Q. Okay. And where have you kept this tape since that date?

A. It's been kept in my case file folder.

MR. BRASS: Your Honor, I would ask to publish the contents of the tape to the jury.

MR. DAVIS: Objection.

THE COURT: Basically, what's the tape number, first of all?

MR. BRASS: I'm going to ask that it be marked as People's Exhibit —

THE CLERK: 5.

MR. BRASS: — 5 for identification.

THE CLERK: People's 5 is marked for identification.

(Plaintiff's Exhibit 5 marked
for identification)

THE COURT: Let me see counsel at the side bar for a minute.

(Side bar conference heard,
not reported)

BY MR. BRASS:

Q. Sergeant Sanford, have you reviewed the statement that you took from Ms. Alexander?

A. Yes, I have.

Q. I want to ask you questions about the statement instead of playing the tape. I want to ask you questions about the statement you took from Miss Alexander that day.

A. Okay.

Q. Did you ask Ms. Alexander how it was that she became injured?

A. Yes.

THE COURT: Does he have the statement, the transcript in front of him to assist him, or does he need it? Maybe he doesn't need it. I don't know.

MR. BRASS: If he needs it to refresh his recollection, a transcript is available, Your Honor. I'm handing it to the witness, Your Honor.

THE COURT: All right.

MR. DAVIS: Is there a copy available for the defense?

THE COURT: Yes. The transcript you handed him is number 4, People's 4 for identification only; right?

MR. BRASS: Yes.

THE COURT: Okay.

BY MR. BRASS:

Q. Sergeant, do you need a moment to review the transcript?

A. Yes, please.

THE COURT: Ladies and gentlemen, an interview with Ms. Alexander at the hospital is an out-of-court statement, and therefore, the transcript is rather lengthy. So there are portions of the out-of-court statement which are hearsay and not admissible because Ms. Alexander is not available to testify.

So therefore, certain exceptions to the hearsay rule exist which allows evidence to come in as to remarks that Ms. Alexander made in response to questioning that are exceptions to the hearsay rule. But as a general rule, an out-of-court statement is not admissible unless it falls within the certain exceptions. So therefore, he can't play the full tape because there are portions of the tape which are inadmissible evidence. Okay?

Go ahead.

THE WITNESS: Okay.

BY MR. BRASS:

Q. Sergeant Sanford, did Ms. Alexander tell you how it was that she sustained her injury?

A. Yes, she did.

Q. And I'm referring to the injury to her head.

How was it that she told you, that she described the manner in which she was injured?

A. She told me that she was hit over the head with a hammer.

Q. Did she tell you who did that?

A. Yes, she did.

Q. And who is the person who did that?

A. The gentleman that's seated at the defendant's table, Mr. Anthony Davis.

Q. Did she describe to you some of the circumstances surrounding how it was that she became injured?

A. Yes, she did.

Q. Did she tell you when it happened?

A. Yes, she did.

Q. And when did it happen?

A. It happened early that morning, on the 1st, on February the 1st.

Q. Let me ask you: what time did you talk to Ms. Alexander?

A. I talked to Miss Alexander later at the hospital. I would have to refer back to my notes for the exact time, but it was somewhere around 10:00 something in the morning.

Q. Could you refer to your notes so you know what time you spoke with her?

A. Sure. I spoke with her at exactly 10:53 hours, so . . .

Q. So almost 11:00 o'clock in the morning?

A. That's correct.

Q. So did she tell you what was going on immediately before she was struck by Mr. Davis?

A. Yes, she did.

Q. And what did she tell you was happening immediately before?

A. She said that they were engaged in an argument.

Q. Did she tell you where this was happening?

A. Yes, she did.

Q. And where is that?

A. It was downstairs in the living room area.

Q. And was that at her home?

A. Yes, it was.

Q. And where is her home?

A. Her home is at 215 Blythdale, here in the City and County of San Francisco.

Q. So when they were engaged in this argument, did she explain to you how the argument escalated, if it did?

A. Yes, she did.

Q. And how did the argument escalate?

A. She told me that it basically escalated due to the fact that the — Mr. Davis would not leave her alone and she kept telling him to leave her alone.

Q. And when Mr. Davis refused to leave her alone, what happened?

A. She said that he went and got a hammer and approached her with a hammer.

Q. Now, did she tell you from where he got the hammer?

A. Yes, she did.

Q. And from where did he retrieve the hammer?

A. She said from an upstairs bedroom.

Q. Did she tell you whether she saw him go upstairs?

A. She said she did see him go upstairs.

Q. And when he returned, he had a hammer?

A. That is correct.

Q. Did she describe the hammer?

A. No. The only description that she could give me was that the hammer was approximately a foot long.

Q. So it was a foot-long hammer?

A. That's correct.

Q. And when he returned with the hammer, did she tell you whether or not Mr. Davis said anything?

A. Yes, she did.

Q. Do you recall what that was?

A. Yes, I do.

Q. And what was it that Mr. Davis said?

MR. DAVIS: Objection, hearsay.

THE COURT: overruled.

BY MR. BRASS:

Q. Sergeant, what was it that Mr. Davis said when he returned from the upstairs with the hammer?

A. She told me that he told her that he was tired of her clowning him.

Q. And aside from that, did he say anything else? If you don't recall, you can refresh your recollection with the transcript.

A. Yeah, I would have to review the transcript.

Q. Could you do that, please?

A. Sure. (Witness examines document) Okay.

Q. Do you recall whether Ms. Alexander stated to you what Mr. Davis said when he returned from the upstairs with the hammer?

A. Yes, I do, reviewing my notes here.

Q. And what did he say?

A. Well, the first thing —

MR. DAVIS: Objection, to the extent the Sergeant's reading from his notes. If his recollection is refreshed, that's one thing.

THE COURT: Does reading from the transcript refresh your recollection?

THE WITNESS: Yes, it does, Your Honor.

THE COURT: Go ahead.

BY MR. BRASS:

Q. Sergeant, what did the defendant say when he came back from the upstairs with that hammer?

A. What did the defendant say?

Q. Yes.

A. In response to her telling him, "Why don't you just leave," his response was, "Yeah, but before I leave, I'm going to do something else."

Q. He said that while he had the hammer in his hand?

A. That's correct.

Q. Did Ms. Alexander tell you whether or not she had been drinking that night?

A. Yes, she did.

Q. And had she been drinking?

A. Yes, she had.

Q. And did Ms. Alexander tell you whether or not she had seen Mr. Davis drinking that night?

A. Yes.

Q. And had she seen him drinking?

A. Yes.

Q. Did she tell you whether or not anyone else was present when she was assaulted?

A. Yes, she did.

Q. And who did she tell you was present?

MR. DAVIS: Objection, assumes facts not in evidence.

MR. BRASS: I'll rephrase.

Q. Was anyone present when she was assaulted?

A. Yes.

Q. And who did she tell you was present at the time of the attack?

A. Her mother, Gloria Persons.

Q. Now, I want to talk to you about right after Miss Alexander was struck with a hammer on the head.

What happened to her once she was struck with the hammer? Did she describe that to you?

A. Yes, she did.

Q. And what did she tell you occurred after she was hit?

A. She told me that after she was hit with the hammer, she fell from the couch to the floor, and she could feel a warm stream of something coming down her head.

Q. Now, you told us that she fell from the couch to the floor. Did she tell you whether or not she was on the couch at the time she was hit by Mr. Davis with the hammer?

A. Yes, she did.

Q. And was she on the couch?

A. Yes.

Q. Was she standing on the couch?

A. No. She was sitting on the couch.

Q. So she was sitting on the couch when she was hit. Did she describe to you if she ever found out what the warm substance coming down her head was?

A. Yes, she did.

Q. And what was that?

A. She said it — she saw that it was blood. She later described herself as being in a pool of blood.

Q. And where was the pool of blood?

A. It was on the floor area right in front of the couch there at 215 Blythdale.

Q. Did she tell you whether or not she lost consciousness?

A. She could not remember if she lost consciousness or not. She said that she was kind of phasing in and out.

Q. So she told you that it was possible she lost consciousness, but she wasn't sure?

A. That's correct.

Q. Now, did she tell you whether or not Mr. Davis routinely kept the hammer in a regular spot?

MR. DAVIS: Objection, hearsay, relevance.

THE COURT: Overruled.

THE WITNESS: Yes, she did.

BY MR. BRASS:

Q. And where was that?

A. Upstairs in the bedroom, the bedroom that they shared together. And she described it as being in, I believe it was a black bag or a black leather bag that she said she had actually purchased for him.

Q. Did she mention to you whether or not, at some point, she had a knife in her hand?

A. Yes, she did.

Q. And did she have a knife in her hand —

A. Yes, she did.

Q. — at some point?

A. Yes.

Q. Did she tell you whether or not she had the knife in her hand when Mr. Davis returned from the upstairs with the hammer?

A. She told me that — when I interviewed her, she said that she had the knife in her hand and she couldn't remember if she had slipped it under the couch at that point or not, but she did admit to me that she had the knife in her hand.

Q. Did she tell you why she had the knife?

A. Yes, she did.

Q. And why was that?

A. She told me it was to protect herself. She stated that she was afraid.

MR. BRASS: Okay. I have nothing else.

THE COURT: Cross.

CROSS-EXAMINATION

BY MR. DAVIS:

Q. Sergeant, let's start with that last statement of yours.

She had the knife to protect herself because she was scared; is that what your testimony is?

A. Yes, sir.

Q. Let me refer you to page ten of the transcript in front of you and ask you to look at the third question on that page:

"So why did you get the knife?"

Do you see that?

A. Yes.

Q. And the answer is what?

A. Do you want me to read it?

Q. Yes, please.

A. "Just to scare him because I know he was — he was gone — gonna, he — would get in my face (inaudible)" —

Q. So you interpreted that —

A. Excuse me, sir. "Inaudible — he would do."

Q. So you interpret that to mean that she got the knife to protect herself because she was scared?

A. I'm sorry. I don't understand your question.

Q. So when you answered the question, "What did she say when you asked her why she got the knife," that's not what she said. Your answer is not what she said; is it?

A. I'm sorry. Is that a question?

Q. Do you recall what she said when you asked her "Why did you get the knife"?

A. Yes. Yes, I do.

Q. And it's not what you said to Mr. Brass earlier; is it?

A. Yes, it is.

Q. Is there someplace else where you asked that question?

A. I talked to her several times.

Again, I would have to review my tape. But I talked to her towards the end of the interview, as well, about the knife.

Q. Where is it, Sergeant, that she said she got the knife because she was scared and she wanted to protect herself?

A. As I just told you, sir, I would have to listen to the tape. It's indicated here that there is parts that was inaudible.

But my testimony is that I recall her saying that she was afraid. That was the reason why she had the knife in her hand.

Q. So are you saying, then, that this is an inaccurate transcription of the tape?

A. I did not say that.

Q. Are you coming in here and are you interpreting this to mean certain things that don't appear on the paper?

A. I'm not interpreting anything. I read it as you suggested.

Q. And to you, does "Just to scare him because I know he was going to — he would get in my face. He would do —" does that mean the same thing as "I'm scared; I want to protect myself"?

A. No, sir, it does not.

Q. Now, you also indicated that she told you — she, Miss Alexander, told you that her mother was present when she got hit with the hammer?

A. She said that her mother was present. She did not tell me that she was physically in the same room. She was present in the house.

Q. Present in the house?

A. That's correct.

Q. She was upstairs; wasn't she?

A. Yes. That's what she told me.

Q. And Miss Alexander also told you that she pulled the knife before she ever saw a hammer; correct?

A. Yes.

Q. And she didn't tell you that she was sitting on the couch when she got hit with the hammer; she told you that her hand was on the couch when she got hit with the hammer, correct?

A. No, that's not correct.

Q. Let me refer you to page four of the transcript, about halfway down.

A. (Witness examines document) Okay.

Q. She didn't tell you she was sitting on the couch when she got hit with the hammer; did she?

A. As I stated earlier, yes, she did.

Q. Was it someplace else during the course of your conversation?

A. What do you mean?

Q. Well, when did she tell you that?

A. She told me that when I was interviewing her.

Q. When during the course of the interview, Sergeant?

A. When during the course of the interview?

Q. Yes.

A. When we were at the hospital when I was talking to her.

Q. We can play games, Sergeant, if you want.

THE COURT: No, no. Just ask questions. You don't need to comment. That's argument.

BY MR. DAVIS:

Q. At what time, what hour, what minute of your interview did she tell you that she was sitting on the couch when she got hit in the head with the hammer?

A. I can't tell you the exact time and minute, sir. I can tell you it was during the course of my interview at the hospital.

Q. Was it in the beginning of the interview?

A. No, it was not at the very beginning. It was somewhere in the middle of the interview.

Q. Okay. So, the portion of the transcription that I referred you to, that's not where she told you that?

A. Yeah, that was around the area where she told me that. That's when we were discussing her physical location.

Q. Okay. But, do you see, "I was sitting on the couch," anywhere in this area?

A. Mr. Davis, as I stated earlier, there are sections in here that says "inaudible," and this is not a clear depiction of everything that was actually said during the interview.

There were other things that was obviously said that obviously was not recorded here, because whoever transcribed the tape could not either hear or make out exactly what was said.

I'm just simply testifying to what I can recall when I spoke with the victim at the hospital on that date.

Q. Well, let me direct your attention to the middle of the page, where it says: "And I guess that's when he must have."

Do you see that?

A. Yes, I do.

Q. "I guess that's when he must have hit his thumb and then I put my hand down on the couch and he hit me in the head.

Then I started calling my mother and she came down."

Do you see that?

A. Yes, I do.

Q. There is nothing inaudible in there; right?

A. No.

Q. But yet, you still maintain that somewhere during the course of that statement, she said she was sitting on the couch when she got hit in the head?

A. To be honest with you, I'm not sure if that was her exact words. I don't recall her telling me anything about him hitting his thumb.

THE COURT: You didn't transcribe this tape?

THE WITNESS: No, Your Honor, I did not.

BY MR. DAVIS:

Q. Would you like to take some time and listen to the tape and perhaps tell us where it is that she said she was sitting on the couch?

MR. BRASS: I'm going to object as to relevance.

THE COURT: Well —

MR. BRASS: The Sergeant hasn't testified he doesn't remember the statement.

THE COURT: Yes.

Next question.

BY MR. DAVIS:

Q. So then what you're telling us is that you remember things differently than they appear on the transcription?

A. I did not say that, sir.

Q. Now, Miss Alexander also told you that once she fell to the floor, she heard Mr. Davis say, "Oh, my God"; right?

A. Yes, she did.

Q. And she also told you, didn't she, Sergeant, that she didn't see the hammer initially?

A. That's correct.

Q. Did she also have a laceration on her finger?

A. Yes, she did.

MR. DAVIS: May I have just one moment, Your Honor?

THE COURT: Sure.

BY MR. DAVIS:

Q. If Miss Alexander were to tell us that she was five feet ten inches tall, would you say that's about right?

A. I don't know. When I saw Miss Alexander, she was actually laying down. She was laying down.

Q. And if she were to tell us that she was, at that time, approximately 225 pounds, would you be able to render an opinion one way or the other with regard to that?

A. No.

Q. Now, at first Miss Alexander actually hit Mr. Davis before she pulled the knife; correct?

A. No, that's not correct.

Q. Didn't she tell you that she slapped his hand away?

A. She described something that happened when they were going for some cigarettes.

Q. And she said, did she not, that he reached for a cigarette, and she slapped his hand away?

A. Yes, I believe she did.

Q. And that was before she pulled the knife?

A. Yes, it was.

Q. And she told you that — where did she tell you she got the knife from?

A. I can't recall.

Q. Would it refresh your recollection to take a look at the transcription? Yes?

A. I don't know. I could try.

Q. Well, let me see if I can assist you. How about the bottom of page nine, top of page ten.

A. (Witness examines document) Okay. Your question again, please?

Q. Did she tell you where she got the knife from?

A. From under the couch.

Q. And did she tell you when she put that knife under the couch?

A. Yes.

Q. And when was that?

A. It was before she went upstairs.

Q. And she put that knife under the couch because she knew they were going to continue to argue; correct?

A. According to her, yes.

Q. Well, was there someone else that we're talking about here?

MR. BRASS: Objection, argumentative.

THE COURT: Sustained.

MR. DAVIS: Withdrawn.

Thank you. That's all I have.

THE COURT: Redirect?

MR. BRASS: Just briefly.

REDIRECT EXAMINATION

BY MR. BRASS:

Q. Sergeant Sanford, after Mr. Davis hit Ms. Alexander with the hammer, you told us on cross-examination that he said, "Oh, my God."

After he said, "Oh, my God," what did he do? Did she tell you?

A. Yes. Her and the mother told me.

Q. Well, let's focus on what Miss Alexander told you. What did he do after he said, "Oh, my God"?

A. She said that he had the phone receiver in his hand and the hammer and he ran out of the house.

Q. He ran out of the house?

A. Yes, that's correct.

MR. BRASS: Thank you. I have nothing else.

THE COURT: Okay. Thank you.

(Witness excused)

THE COURT: Next?

MR. BRASS: Your Honor, at this time, the People call Dr. Grant Gauger to the stand.

Your Honor, Dr. Gauger is present. I would ask that he be sworn.

THE COURT: Sure.

THE WITNESS: Good morning, Your Honor.

THE COURT: Good morning, doctor. How are you?

GRANT E. GAUGER, M.D.

Called as a witness by the People, being duly sworn, testified as follows:

THE CLERK: Please be seated.

THE WITNESS: Thank you.

THE CLERK: Please state your name and spell it for the record.

THE WITNESS: Yes. My name is Grant E. Gauger, G-A-U-G-E-R.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. BRASS:

Q. Good morning, Dr. Gauger.

A. Good morning, Mr. Brass.

Q. What is your occupation?

A. I'm a neurosurgeon at the University Of California.

Q. And what position do you hold? What's your job title at the University Of California?

A. My academic title is associate clinical professor. And my work is as acting chief of neurosurgery at San Francisco General Hospital.

Q. So in the neurosurgery department, you're the boss?

A. I am the boss of part of the neurosurgeon — of the university's department.

Q. On February 1st of 1998, were you working at San Francisco General?

A. I'm not sure that I was there that day. I was responsible for all things that happened there in neurosurgery that day.

Q. At some point on or about February 1st of 1998, did you examine or treat a woman by the name of Ella Marie Alexander?

A. Well, Ms. Alexander was seen in the emergency department and admitted to the neurosurgery service at San Francisco General Hospital.

My name is on one of the sheets in the chart, but one of my colleagues, Dr. Martin Holland, was more involved in her care that day and the subsequent two or three days, since I was at the veteran's hospital working there. But other doctors working with us also took care of her.

She was the responsibility of the neurosurgery department, yes.

Q. And have you had an opportunity to look at either x-rays or records of doctors who did examine her?

A. Yes, both.

Q. Okay. So you looked at x-rays of her head?

A. Yes.

Q. And when you looked at the x-rays of her head, did you observe an injury there?

A. She had — yes. She had a fracture of the skull in the top of the head, what's called the vertex of the head, V-E-R-T-E-X.

Q. What sort of fracture?

A. The bone was broken and pushed inward, and there is a term for that called depressed fracture. So she had a depressed fracture of the top of the skull.

Q. And what is a depressed skull fracture?

A. Well, the skull, of course, is a complicated series of bones and —

MR. DAVIS: Objection.

THE COURT: Yes. I think we're here to talk about the — this goes to explain the impeachment testimony?

MR. BRASS: I'll move on, Your Honor.

THE COURT: Okay.

BY MR. BRASS:

Q. Dr. Gauger, did you observe x-rays of the depressed skull fracture?

A. Yes.

Q. And —

A. I brought the films with me, in case they're useful to the court.

Q. In observing the x-rays of the depressed skull fracture on Miss Alexander's head, were you able to form an opinion as to how much force was required to cause such an injury?

A. Well, the simple answer to that is sufficient force to break the bone of the head, which is the skull.

Q. And how much force is required to break the bone of the head or the skull?

A. Well, it's not the bone of the head or the skull. I may not be explaining carefully. I'm trying to simplify it.

The skull consists of several bones, and so the bone of the head is the skull. And she had a fracture, a break, of the skull. And considerable force was necessary to cause that fracture.

Q. Can you analogize that in some way so that we can determine how much force would be required?

A. I suppose that the simplest way to think about it would be as if one struck some heavy piece of very solid wood, hard wood, not a soft wood, like pine, but a hard wood, and caused damage to that wood by a blow.

I think one would get an idea that substantial energy was necessary to break the wood, particularly to break it in such a way that it's driven inward, and that's the case here.

Q. So it would be enough force to actually break a hard piece of wood; is that your testimony?

A. At least that much force. It depends on the thickness of the wood.

And I don't want to be complicated about it, but to simplify it, within the bounds of correctness, the skull is harder and stronger than many forms of wood, so it would require at least as much energy as it takes to break a piece of hard wood.

Q. Now, hypothetically speaking, let's say that Miss Alexander's injury was caused by a foot-long hammer like this one (indicating).

This, I'd ask be marked as People's Exhibit 6 for identification.

THE COURT: Sure.

THE CLERK: People's 6 is marked for identification.

(Plaintiff's Exhibit 6 marked
for identification)

BY MR. BRASS:

Q. Doctor, would you have an opinion as to whether such a hammer could cause such an injury if it was in the process of slipping out of someone's hand?

A. Well, such a hammer — with regard to the first part of that question, such a hammer could certainly cause the injury that we saw in the patient and that was documented on the x-rays.

With regard to slipping from the hand, that's a different, much more complicated matter. This kind of energy that's required to produce a depressed fracture like this is a type that really demands some attention. It demands a focused blow, as if one, for example, is striking a nail. I mean, that's what hammers are for, is to deliver a lot of energy in a focused, limited area. And this kind of injury is a lot of energy in a focused area. And I think that's very unlikely to happen by some slip out of the hand.

It is possible that a hammer like this or another object like this that falls from a great height, like a third or fourth story window — we see such cases — and through an accident, lands on the head of some pedestrian or passer-by. That kind of a scenario or that kind of an event can certainly produce this kind of injury.

Q. But absent falling from great height, do you have an opinion as to whether a hammer swung causing that injury was gripped firmly or slipping out of someone's hand?

A. Well, the word "swung" implies that it is in somebody's hand and under control. That's what the word "swinging" or swinging a hammer, or a hammer having been swung, that verb, that word, means, to me, a controlled blow.

I think it's a controlled blow that caused this injury, not a hammer that, for example, if I had a — if the hammer were this marker and I dropped the marker on the desk, I think that injury, that event, even with this heavier hammer, will not produce this depressed fracture, if I make myself clear.

Q. You do.

In your opinion, was that injury caused by — absent any falling, if that hammer was in someone's hand, was that injury caused by someone gripping the hammer firmly?

A. Well, firmly enough to guide the hammer. I don't know how to answer it beyond that point.

Q. And firmly enough to generate energy equal to the hammer falling from about three flights up?

A. I am not sure about the amount of energy involved. That's an area of physics. One can do some complicated calculations, and I could do that.

But the energy delivery here to the head is very substantial. And that requires a certain amount of guided force is what I'm trying to describe here.

MR. BRASS: Thank you, doctor.

THE COURT: What was the circumference of the depressed fracture?

THE WITNESS: Approximately the size of a quarter, Your Honor.

THE COURT: okay.

MR. BRASS: I have nothing else.

THE COURT: Cross examination.

CROSS-EXAMINATION

BY MR. DAVIS:

Q. Good morning, doctor.

A. Good morning.

Q. Did you personally examine Miss Alexander at any time?

A. I don't think I did. I reviewed the chart and several doctors working with me did, but I think that I was at the veteran's hospital that day, the 1st of February and the following day, and she was discharged on the third day. So I can't find a record that I personally saw her, but those working with me, other neurosurgeons, did, and recorded it in the chart.

Q. During the course of your evaluating Miss Alexander's records, did you determine what her height and weight were?

A. It's — those are recorded in the chart. I'd have to look them up. I don't know from memory.

Q. Do you have those with you?

A. I'll look for that, if you like.

Q. Please.

A. Her height was recorded as five feet ten inches, and I don't, on the first sheet, see a weight recorded. It may be recorded in the chart, but I don't see that.

Q. From looking at the pictures that you have of the x-rays, rather, would it be out of line to say her weight is approximately 225 pounds?

A. Yes, it would be out of line. No such comment could be made on the basis of the skull x-rays that I have. No commentary could be made about weight, with the exception of patients who have profound obesity, in which case the soft tissues of the scalp are enlarged enough that a person can get — can simply say that the amount of fat in the body exceeds the normal range.

Other than that — and that was not the case here — other than that, it would be improper to make any comment about 225 pounds or any other number of pounds.

Q. You were very careful during the course of direct examination to say that it's very unlikely that the hammer slipped; correct?

A. I think it's unlikely that the damage done to this patient with this hammer, if it was — if the damage was done by a hammer, was done in a setting in which the hammer moved a short distance following the loss of a grip or some other cause for it to be dropped.

If one is talking about dropping a hammer from a greater distance than what I say does not apply and the amount of energy increases with the height that the hammer falls, as I implied earlier, and it's entirely possible, in a case like that, to have this kind of serious injury.

Q. Now, looking at —

A. In other words, to add to that, this injury is not caused by a trivial movement of a hammer or any other object in relation to this patient's head.

Q. Now, looking at the chart again, you can't tell from looking at the chart or looking at the x-rays what went on immediately prior to the infliction of the wound; correct?

A. I'd have to know what — in what sphere you're speaking about what went on. So I can't answer that question unless you clarify it.

Q. Well, is there any sphere in which you can tell us what the respective parties were doing immediately prior to the infliction of the wound?

A. That's a subset, or that's a different question.

Q. That's my question.

A. I can say that this lady, for example, was alive before this injury, and so forth, but I can't say what interaction between people was, certainly not. That's entirely outside the range of this record.

Q. And you can't tell from looking at the records in front of you what Miss Alexander was doing with her hands immediately prior to the infliction of the wound; correct?

A. Well, I'm glad you brought that up. I can't say with — in detail what she was doing with her hands.

She did have apparently two injuries of the upper extremities. She had a cut of the finger of her right hand and x-rays were obtained of her left arm, although I can't be certain from the chart what injury, if there was an injury, of the left arm prompted the x-rays.

So she had attention to two parts of her arms, the finger on the right and the arm on the left. The finger was cut, was cleaned, was washed, dressed, and she was referred to a hand clinic for that for follow-up.

The left arm films were normal, and there is no other reference to a problem with the left arm.

So, I simply can say that she had injuries, apparent injuries, of both arms. Whether that was in relation to this injury to the skull or not, I can't say with certainty.

Q. Okay. Thank you for that.

But let me ask my question once again. You can't tell, from the x-rays that you have in front of you, what Miss Alexander was doing with her hands immediately prior to the infliction of the wound; can you?

A. Not beyond what I just said.

Q. You don't know if she was swinging them around?

A. No, I don't.

Q. Now, Miss Alexander was discharged the evening of the 3rd; right?

A. She was discharged February 3rd, 1998.

Q. Approximately late afternoon?

A. I'd have to see what time, but I'll be glad to.

Q. That's okay.

A. Well, you asked a question, and I will give you an answer. It may take me some time to give you an answer, but an answer, you'll get.

Q. That's okay, doctor. I'll withdraw that question regarding the time.

A. All right.

Q. Now, when you talk about the delivery of force, isn't it true that a bigger individual is capable of delivering a greater amount of force, all things being equal?

A. Some big individuals are weak and some small people are very strong. If there is some correlation between muscular power and size of the patient, then I suppose what you say is true. Even a small person is capable, with this instrument, if this is the instrument, of delivering even fatal blows to the head. So — but I think probably you're correct.

MR. DAVIS: Okay. Thank you. That's all.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. BRASS:

Q. Doctor, looking at Ms. Alexander's x-rays, is there anything else in the x-rays of her skull that is indicative of the amount of force that was required by the instrument that caused the injuries?

A. I don't think beyond what we've talked about. She had, as I said, bone driven inward, which always means that there is substantial force applied to the outer surface of the skull. And that was enough to move the bone toward the brain.

Again, it's an indication that this is not a trivial — no aspect of this, of course, is a trivial injury.

Q. Would you consider this a serious injury?

A. Very.

MR. DAVIS: Objection.

THE COURT: Overruled.

MR. BRASS: I have nothing else.

THE COURT: Doctor, what part of the head are we talking about where the injury was?

THE WITNESS: The very top of the head.

THE COURT: The very top.

THE WITNESS: The vertex, the V-E-R-T-E-X, is the very top of the head.

What made this injury particularly dangerous is —

MR. DAVIS: Objection, nonresponsive.

THE COURT: Overruled.

Go on.

THE WITNESS: — is that the — underneath the bone in the absolute middle of the head is an enormous vein, and that, in all of us, all the time, has a very high volume of blood in it.

This kind of injury can damage or block off or break that vein and cause either very severe hemorrhage in the head or a form of stroke by blocking off the blood flow.

I think that didn't happen in this case. The bone was driven inward, but she has survived this. But its potential for danger is very, very —

MR. DAVIS: Move to strike that testimony.

THE COURT: Overruled.

Go ahead. That's it? Any more?

MR. BRASS: That's it.

THE COURT: Any further questions?

MR. DAVIS: I have a couple of questions.

RECROSS-EXAMINATION

BY MR. DAVIS:

Q. She was discharged, and her condition upon discharge was good; correct?

A. Yes. "Satisfactory" is what I usually use if patients are doing satisfactorily. Then that's the description for it.

Q. Could I refer you to — do you have a discharge summary in front of you?

A. I do.

MR. BRASS: Objection, relevance.

THE COURT: Overruled.

THE WITNESS: Condition on discharge, at the bottom of the first page of the discharge summary, says "Good."

BY MR. DAVIS:

Q. Okay. And regarding all of the information you gave us about the vein in the head, there was no hemorrhaging or anything in this particular case; correct?

A. Probably not.

Q. Would you like to look at your charts? Would it help you?

A. No.

Q. Okay.

A. The reason I say "probably" is that an injury — I want to be accurate in the answer.

The C.T. scan doesn't show blood underneath this — any significant blood underneath this depressed fracture. But everyone who has a depressed fracture like this has bleeding. It's simply a matter of the amount of bleeding.

If one were to lift the bone fragments up, there is invariably always, in every single case, bleeding underneath the bone and outside the brain. So, the answer to the question is they're bleeding; there is always bleeding in an injury of this magnitude. But it may not be the type of bleeding that shows up as a large blood clot on C.T. scan.

The C.T. scan did not suggest a large blood clot.

MR. DAVIS: Could I have marked as defense next in order —

THE COURT: Sure.

MR. DAVIS: — a one-page document from the department of radiology.

THE CLERK: Defense B is marked for identification.

(Defendant's Exhibit B marked
for identification)

MR. DAVIS: May I approach the witness?

THE COURT: Sure.

MR. BRASS: Counsel, may I? That's fine.

BY MR. DAVIS:

Q. Doctor, let me show you what's been marked as Defendant's B, and across the upper right-hand corner "Alexander, Ella" with some other identifying information, and refer you to the second paragraph under "findings," and the last sentence there.

A. Yes. The last sentence says: "No evidence of intra or extra-axial hemorrhage."

This is based on the radiographic findings, and it's just as I said a moment ago.

Q. Okay. So there is no evidence of any type of hemorrhaging; correct?

A. On the basis — that's the report of a — that isn't a neurosurgeon's report or an operative report. That's an x-ray report. And on that x-ray, there is no hematoma, and that's as I just explained.

Q. All right. Thank you. Nothing further.

THE COURT: Thank you, doctor.

THE WITNESS: Thanks very much, Your Honor.

(Witness excused)

THE COURT: Okay, ladies and gentlemen, it's 10:35. Let me just see counsel for a minute, please.

(Side bar conference heard, not reported)

* * *

OPENING ARGUMENT

MR. BRASS: Members of the jury, this is Ella Marie Alexander. Pass it around, please. She had her skull caved in by her boyfriend with a hammer.

Here is the boyfriend. Those are the hands that wielded the hammer.

It's my job to prove that it wasn't her fault. There are certain elements that, as the district attorney, I have the burden of proving to you beyond a reasonable doubt.

The defendant is charged with assault with a deadly weapon. These are the elements of that offense.

Now, in a case like this, I'm sure you have a lot of questions; I'm sure there is a lot of pieces of this puzzle that you don't have. We're all limited by the evidence, and as jurors, it's your job to focus on the evidence. When the case is over and your deliberations are over, you can walk out of here and speculate about all kinds of things, but as jurors, you're limited by looking at what it is we do have.

There are certain things that you don't have to go into the deliberation room and wonder about, because there are certain facts that are undisputed, certain facts that no one is saying didn't happen. For instance, a deadly weapon was used. You heard from Sergeant John Sanford; you heard the voice of Glory Persons on the 911 tape, and she's frantic. She's hysterical on that tape. That evidence, those statements, come in for their truth. They come in as evidence of what they're stating.

And everyone says that this was a hammer. Ms. Alexander describes it as a one-foot-long hammer.

In evaluating whether a weapon is deadly, you look at the way it's used, look at the nature of the way the implement is used.

Well, here is a foot-long hammer. It's not the hammer. It's just one that is perhaps like it. It's a foot long, nothing exceptional about it, but it's a hammer that was swung at Miss Alexander, hit her on the head. Using a hammer to a head is a deadly weapon. It doesn't have to be a gun or a large knife or a sword. This getting swung at your head, overhead, to the top of your head, that's a deadly weapon.

You heard the doctor testify about the seriousness of that injury. You heard the doctor testify, as graphic as it is, about a vein that runs right under where that hammer struck.

This is a deadly weapon. You don't have to wonder about that element. No one in this room is saying that a hammer wasn't used. A hammer was used, and it caved in her skull.

The assault was on the person of another. He didn't assault himself; he didn't assault something else; he assaulted another person, Ella Marie Alexander. She was the one hit, and no one is saying otherwise.

Two elements you don't have to think about. This last element is a separate count, great bodily injury inflicted. That means was it more than just a slight bruise, was it more than a black eye?

There is actually law on this, and the law says that a fractured bone may be great bodily injury, and a fractured skull —

MR. DAVIS: Objection.

THE COURT: Sustained.

MR. BRASS: A fractured skull could not be a more serious bone.

He said this is not a trivial injury. There is nothing trivial about it. It's a serious injury.

Great bodily injury. She had a fractured skull.

Interesting, you have the medical records. Some of them will be in evidence, and you can look at them. I've blown up two portions of them here. This was written on February 1st of 1998. Or this is the date of the examination that's being performed, the same date as the assault. And you can look here. You'll have this sheet in the jury room. "Depressed skull fracture with bony fragments noted at the vertex," just like the doctor testified, seen on the axial image only, a depressed bone fracture.

You'll also have this sheet from the same examination. A depressed skull fracture is noted at the vertex of the skull.

She had her head caved in by a hammer. It's a very serious injury. You don't have to wonder about that.

The debate in this case, the issue in this case, because this is all settled, are these elements; whether Anthony Davis assaulted her willfully and whether he did it unlawfully.

Now, what does "willfully" mean? "Willfully" means on purpose. It means it wasn't an accident; it means it wasn't done while sleepwalking; it wasn't done as a result of some sort of trauma in the body where he flicked the hammer and hit her on the head; it was done with purpose.

You heard Dr. Gauger testify about the nature of the blow. His word was a "focused blow," a focused blow. And to analogize the amount of force necessary, he said it would have to fall from some great height. He didn't know exactly what great height, but instinctively, he said like a third story. That's a lot of velocity, this thing falling from a third story hitting someone on the head.

This was swung; it was swung at her head; it was done willfully. It was done on purpose and with purpose, and with focus.

Unlawfully is the debate here. That's where we talk about self-defense. "Unlawfully," for our purposes in this case, means that this was done not in self-defense.

You have conflicting stories on this. There is a lot of different accounts you've heard. No two accounts are the same. We don't have a sportscaster there to give us a blow-by-blow of what happened at 215 Blythdale at 3:00 in the morning on February 1st of 1998.

The evidence came in differently than I expected. I was surprised when Gloria Persons didn't show up.

We have the statements of people given at different times. And when they're given is really significant.

Right at the scene, right when it happened, Glory Persons and Ella Alexander told a story, told a short story, not a lot of detail. But at the moment, Ella was lying in a pool of her own blood. She's face down bleeding. Paramedics are attending to her.

Officer Salazar may not have observed everything because he's trying to stop the bleeding with the paramedics. There is a lot going on. It's a frantic scene. Glory is watching her daughter bleed on the floor. No one is a detached observer, no one is not emotionally involved in this instance.

So they watch this, and they tell the officer what happened. Ella says: "My boyfriend, Anthony

Davis, this guy, hit me with a hammer." That's what they both say.

But Glory says something else. At that moment, she says that Ella was sitting on the couch. Ella was sitting down. Glory says that Anthony pushed her on the couch, but the point is at that moment, Glory says Ella was sitting down when she got hit. Remember that. Right at that moment, when the blood is still pouring out of her daughter, Ella was sitting on the couch when she got hit.

If you want to disbelieve Glory Persons at that time, you have to think that after that 911 call — and listen to that tape, listen to how hysterical she is — that, in the next few minutes before Officer Salazar arrived, she concocted this lie, she concocted this tale. "I know what I'll do. While I'm putting towels on my daughter's head, I'll wait for the police to arrive, and when they do, I'll tell them Ella was sitting down, because months from now, maybe there will be a trial, and that will be somehow advantageous."

She didn't make up that fact. That was in a moment of pure emotion. She tells the story as best she can recall. She's got Ella sitting on the couch.

While in the hospital, with her head bandaged, like she is in the picture, Ella tells a story, too. Ella tells John Sanford, the very next day, she's admitting to him that she was drinking, she's admitting to him that hey, she had a knife because she was worried about this guy.

It's not something that we condone. She had a knife. And she's telling him this. She's not making up a story to make herself look innocent. She admits it to the officer. And she tells him, too, "I was sitting down when I was hit with a hammer. I was sitting."

Look at the nature of the injury. It's to the vertex of her head. It's a fact we all accept, that although we haven't seen Ms. Alexander today or yesterday, she's five-ten. And look at him and estimate his height for yourself. But she's not a small person. She's five-ten. And where is the injury? It's here, the very top of the skull.

According to what the defense wants you to believe, she's armed with a knife at the time it happens, standing up, armed with a knife. Somehow this man gets the hammer to the top of her head.

Now, she's standing in front of him armed with a knife.

What's going to happen? He's going to get cut everywhere. She's armed with a knife and he swings like this to the top of her head? That doesn't make any sense. It's not the kind of human reaction that any of us would perform.

And you didn't have to check your experience at the door. We all know how people react. A knife's coming at you. If he had broken her arm with a hammer, maybe we would be talking about self-defense, but he didn't. He didn't swing at the knife. This hits her on the top of the head. She's five-ten.

Also, Dr. Gauger testified that the injury was the size of a quarter, approximately the size of a quarter. That means that the hammer didn't hit her like this (indicating); it didn't even hit her at an angle.

The head of this hammer hit her flat on the top of the head, just like as if she was sitting down in front of Anthony Davis and he hit her. That's when this lands flat; that's when he has access at the top of her head, when there is no knife and when she is sitting down. That's the only way this could have happened. It's the only plausible explanation.

Glory didn't make up a story to help her daughter or to help this case. You can see how much she cares about the case; she's not even here.

Ella didn't make this up. She's telling the sergeant, "Yeah, I armed myself with a knife because I was worried about this guy."

She's not trying to make a case against Anthony Davis.

But on February 1st, they both say Ella was sitting down when she was hit. She's sitting down.

Now, does that prove it wasn't self-defense? It does. And the law is clear on this. You see, everyone has a right to defend themselves; there is no question about it. If a woman comes at a man with a knife and he uses a sword to defend himself, that's only reasonable. We're not expecting him to simply stand there and get stabbed and get cut by this woman.

By the way, do you know how much evidence there was that he was cut at all? You know how much evidence there was that there was any contact between these three knives, the one in the sock and the one in each hand against this man? Zero, nothing, not one thing, not one drop of his blood, not one cut on this man did you hear about. There is nothing in evidence about that. He escaped this woman with three knives pretty clean.

So, she's sitting on the couch. You have a right to defend yourself, as long as the threat is imminent. If she is coming at him, he can defend himself. But once she sat on the couch, well, the threat's over.

Self-defense exists only as long as the real or apparent threatened danger continues to exist. She's coming at him; the threat exists. She sits down on the couch. When the danger ceases to appear to exist, the right to use force in self-defense ends.

She had a knife to defend herself. Her words were, "I was worried he'd get all up in my face, so I got a knife to protect myself."

Whether she's justified in doing that, probably not. We probably don't like people getting knives in anticipation of trouble. But the fact is it doesn't rise to self-defense. She has the knife; she said she put it under the couch, which also explains why Officer Salazar never saw it. She put it under the couch; she sat on the couch. He goes upstairs to where his tool bag is.

That's where his tool bag was was up the stairs, just like she had told John Sanford. He gets his hammer. Maybe he saw the knife before, said, "well, I'm not going to put up with that," comes back downstairs with a hammer to find her sitting on the couch. There is no real danger.

By the way, whose house is it? We know Ella Marie Alexander lives at 215 Blythdale, as does her mother. She's home. It's 3:00 in the morning. She's sitting on the couch.

She may have insulted him; she may have gotten that knife in anticipation of trouble. We may not like it, but she was sitting on the couch. He comes back from the upstairs, got a hammer. The hammer hits her flat on the very top of the skull, an injury approximately the size of a quarter. She had to be sitting down, just like she told Sergeant Sanford, just like Glory Persons told Officer Salazar.

Now, you have another statement that you heard. Nigel Phillips took the stand. He told you about Ella Marie Alexander calling him on the phone. She had two knives here (indicating), she said — or he said she said — and one knife in her sock. She came at Anthony Davis. She drew the two knives; right? She draws two knives. She comes at him. She's swinging the knives at his throat and at his face.

According to that statement, this man is just escaping death; he's escaping fatality, grabs his hammer from we don't know where and swings it, and then she says it slips, slips maybe out of his grip, maybe just within his hand; it's just loosely gripped enough for it to slip, and it hits her on the head by accident.

She has established for Mr. Davis self-defense and accident. It's at least not his fault. This innocent man was defending his life, and even within that context, it was only an accident that caused the hammer to hit her head.

She tells him, "I was drinking." You could almost hear her telling the story, "Oh, yeah, I had knives everywhere, knife in my sock, knife here." She was a mad woman that night. That's the story that you're expected to believe.

Now, what's wrong with that story? First, she told it for the first time on July 9th, 1998. That's what Nigel Phillips said. You can ask for readback.

He got a phone call on July 9. That's last Thursday. This happened February 1st. She had two intervening opportunities to tell that story to people who had the power to drop the charges on this man. I talked to her on the phone. You heard me testify about that. I met with her; I saw her. She said it was an accident.

When asked for details, she wouldn't give any. She wouldn't say anything. She wouldn't even say, "You know what? I went after him," period, never mind the knives. She didn't say that. She just said it was an accident. She doesn't tell the story for five and a half months. She's sitting on this story. That's a lie.

Just last Thursday, she decides to call the investigator for his attorney and tell him this tale, describe this incident in which it was all her fault. She was not only drunk, but even in her drunken state, she remembers exactly how everything happened.

And here's the one I like. She says the hammer slipped in his hand, didn't say it slipped out of his hand, just slipped as he was swinging it, so much so that it hit her on the head by accident.

How did she know that? How did she know? Did she see it right before she got her skull caved in? Did she see it slip? Could she feel his hand? She knows that.

Who told her that the hammer slipped? How does she know that?

Members of the jury, you may wonder exactly what happened at 215 Blythdale on February 1st. We probably won't know exactly what happened. There is a lot of things that could have happened in that house. And we don't have a story, we don't have a clean line like someone writing a book, like a sportscaster telling us each and everything that occurred. We don't have that.

And I told you at the beginning of this case there is going to be pieces of this puzzle that are missing. But you have enough pieces. You have the initial statements which, by the way, they come in for their truth because they're given in such a way, at such a time, that people wouldn't concoct things like that, not when she's lying in a pool of her own blood, not when she is in a hospital freshly bandaged. She wouldn't concoct a story then. That's why those statements come in; that's why they're seen as so reliable.

The witness Glory Persons has her sitting down. Ella even admits she was sitting down, even admitting conduct we wouldn't like.

Because she was sitting down, there is not lawful self-defense. There was no threat. He went upstairs and got a hammer and came back. There is no lawful self-defense here. She was sitting down in her home at 3:00 in the morning, maybe after doing things that weren't right, but she's sitting. And this hammer caved in her skull, and the hand that wielded it is right there.

At the conclusion of the arguments — you've heard all the evidence — the People are confident that you will see through her story, you will see what's going on with this victim of domestic violence, and that you will find him guilty of assault with a deadly weapon and of using force that actually produced great bodily injury.

Thank you.

THE COURT: Okay. Mr. Davis?

MR. DAVIS: Thank you.

CLOSING ARGUMENT

Mr. Davis: Good morning, ladies and gentlemen. I want to thank you, first of all, for your patience and the attention that you've given us throughout the course of this trial. I know we had some bumps along the way, but it was obvious that you were attentive and that you were giving us everything that you had.

This is the best system we know, and this is your opportunity to hear from me regarding what transpired during the course of this trial. And I'm confident that after you hear the arguments, that you'll be comfortable with the lack of evidence such that you'll return verdicts of not guilty.

It's interesting that the prosecutor started off his opening argument, his opening remarks by saying: there is a lot missing here; there is a lot missing. We all don't know what happened; we're all wondering exactly what happened.

Then goes from there in an apparent effort to have you fill in the pieces, to tell you to make certain assumptions, to reach certain conclusions. Well, that's not your job. Your job is to look at the evidence that was presented to you and base your decisions on that evidence, not to fill in any missing pieces. As the prosecutor readily acknowledges, not to wonder what happened out there.

It's clear he's wondering what happened out there. Everybody's got to be wondering what happened out there. And to the extent you're wondering what happened out there, there is reasonable doubt. That's reasonable doubt under the law.

Who did we hear from in this case? Let's start off with Officer Salazar. Let's refer to him as the revisionist cop. He comes in; he tells us a story about a statement allegedly by Ms. Glory Alexander. I don't know if you recall what he said, but when asked whether or not a statement was made prior to her being hit in the head, he said yes, he's absolutely certain. When asked what that statement was, he said that Mr. Davis said to Miss Alexander, "I am going to kill you, bitch." He didn't stutter; he didn't hesitate. Those were his words.

When I asked him, first of all, whether or not he understood what it meant to write a report, he said, "Oh, yeah."

"And why do you write reports?

"So that you can record the events."

When asked whether or not you include critical information in those reports, he said yes.

And when I asked him if that statement was a critical piece of information that he would have included in the report, not only did he say yes, but he said it was in there.

Well, at this point, I'm baffled. Maybe he's got a report that I don't have. I walk up to him, show him his report, he looks at it. What does he say then? "Well, no. He didn't exactly say that. He said, 'I've got something for you.'"

When asked how he made that leap, he said that's his interpretation, his interpretation of what was said.

Ladies and gentlemen, this is not about interpretations. This man is charged with a very serious offense. And we have police officers to come in here in front of you willfully telling falsehoods, interpreting facts to bolster a case that lacks evidence. He knows he was wrong; he knows that's a violation of his duty.

You, ladies and gentlemen, are the judges of the credibility of each and every witness that testifies. The judge read an instruction to you that tells you if you believe that a witness is materially false in one aspect of the testimony, you are to distrust the balance.

Officer Salazar was willfully false. Why was he willfully false? Because he knew that Ella Alexander didn't want to come in, and he felt like he needed to do whatever he could to help out the prosecutor.

Let's look at Miss Persons. Mr. Brass indicated that he was surprised that she didn't show up. Well, I'm not. I'm sure Ms. Persons knows what the penalty for perjury is.

Ms. Persons, according to the good Officer Salazar, says that she witnessed the entire incident, that she was downstairs. She's the only one that says she was downstairs.

Miss Alexander says her mother was upstairs. She says that to Sergeant Sanford, who, by the way, tried to be a little cagey when asked by the prosecutor whether or not Miss Persons was present at the time. He said, "Oh, yeah, yeah, yeah, she was present."

When asked on cross-examination what he meant by "present," he said, "Well, 'present' doesn't mean that she's in the same room. 'Present' means she's in the general vicinity."

The fact of the matter was she was upstairs. She was upstairs. And Sergeant Sanford knew it, and he attempted to withhold that by playing games with what the word "present" means.

She was upstairs. She did not see a thing. The prosecutor talks about Miss Persons telling a short story. Well, that's one way to put it; right? I tend to agree with that; she told a short story. And to the extent that she's telling stories and to the extent that she's making stuff up, you are to distrust her, as well.

It's curious that the two people who claim to be eye witnesses chose not to come before you. As the prosecutor said, they don't care about it. Miss Alexander told Mr. Brass, "This was a drunken accident. I don't want this to go any further. It was an accident. We were drinking. We were drunk."

Keep in mind the fact that the burden of proof rests squarely right there (indicating). The prosecutor has the burden of proving each and every element beyond a reasonable doubt. He can't ask for you to throw in the additional missing pieces of the puzzle; he can't ask you to answer the questions that he, himself, has regarding what transpired on February the 1st. He's got to give you the information. And there is nothing there. It just does not exist.

Now, don't get me wrong. Ms. Alexander was injured. She was hurt. And I'm not standing before you asking that you condone the behavior that led to her injuries. I'm not asking you to understand what it means for two people to get drunk, one to pick up a knife, another to pick up a hammer, and to go at each other. I'm not asking you to understand that.

What I'm asking you to focus on is simply the fact that in this particular instance, Ms. Alexander was the aggressor, clearly and simply, she was the aggressor, by all accounts.

Sergeant Sanford told us Miss Alexander said she got a knife. When asked where that knife came from, he reluctantly said it was under the couch, where she had put it.

Why did she get the knife? He says because she said she was scared; yet, he couldn't point to the place in the transcript or the point during his interview where she told him that was the reason she got the knife.

When confronted with the letters in black and white, he said, "Well" — if you recall the language — "she got it because she knew they were going to continue to argue."

It's a whole lot different than saying "I'm scared."

"I'm going to argue, so I'm going to hide a knife here, and then when he comes back, I'm going to have this knife in my hand. I'm going to be ready for an argument."

It's a lot different than what Sergeant Sanford said.

Prior to her getting the knife, she and Mr. Davis were arguing. Mr. Davis reached for a cigarette. She slapped his hand away. Again, she is the aggressor. She admits that she has the knife in her hand before she sees Mr. Davis or sees a hammer. Again, she is the aggressor.

Officer Salazar spoke with Miss Alexander and, again, it's interesting that he didn't go into anything about knives. If you recall, I asked him, "Did you ask her anything about what led up to her being hit in the head?

"No.

"Did you ask her if she had pulled a knife?

"No.

"Did you ask her if she had been drinking?

"No."

All he did was ask questions that were going to point to someone else. He wasn't interested in getting a detailed statement. So that takes us to the hospital with Sergeant Sanford.

Sergeant Sanford also made some misstatements. I've already pointed one of them out, the statement regarding — the statement — excuse me — the statement regarding whether Ms. Persons was present. It's not a difficult question, but again, it's an indication of the effort on the part of the police officers in this case to mislead you and to give you a false sense of what transpired.

Present in the general vicinity, present in the same room, he knew what we were talking about.

He also indicated that Miss Alexander told him that she was sitting down, yet he couldn't tell us when she said that, couldn't point to a place in the transcript where she said that.

Again, we've got these interpretations; again, we've got officers doing what the prosecutor is asking you to do, and that is, fill in the missing pieces to a puzzle that doesn't even have the borders around it.

Sergeant Sanford reluctantly admitted that Miss Alexander pulled a knife. And the fact that she pulled a knife is, as the judge indicated to you, or could be as the judge indicated to you, a declaration on her part against her penal interests. In other words, she could get in legal trouble because she knows that she has assaulted Mr. Davis. So why does she tell Sergeant Sanford in the hospital only about one knife? She doesn't want the finger to point directly at her; yet, she knows. She knows that they're going to find out about the fact that she used knives.

She talks to Mr. Phillips sometime later, and she gives a fuller, detailed account of what happened. She gets the knives, and for some reason, she gets three of them. And again, I'm not asking you to understand that; I'm not asking you to condone that or to go along with that, but that's what she says. The alleged victim admits that she was the aggressor, three knives, she sees Mr. Davis, she goes at his face and at his neck.

It's then that he picks up the hammer. And he swings the hammer in an effort to knock the knives out of her hand.

And by the way, keep in mind the fact that she has a laceration on her thumb, a laceration on one of the hands in which she was holding a knife. Very doubtful that she got that laceration just by holding the knife steady. No. She was swinging those knives. She was angry. She wanted him to get out. And she is taking matters literally into her own hands.

He then gets a hammer. You all agreed, during the course of voir dire, with the principle that a person is entitled to defend himself. None of you had a problem with the idea that a man might need to defend himself against a woman, and in this case, not a petite woman, five feet ten inches tall, 225 pounds, drunk and coming at you with two knives. You bet you're going to try to defend yourself; you bet you're going to do whatever you can to try to get those knives out of her hand.

Just picture it. Think about self-defense. Just imagine yourself in front of that person charging you, knives in her hand.

I'm not going to read to you all of the self-defense instructions, but I think that it's critical that you focus on a couple of them.

One is the one that says that a person that is being attacked need not retreat. A person is entitled to stand there and defend himself or herself, and that's what Mr. Davis did in this instance.

Another key factor, when you talk about self-defense here and you think about what happened here, think about the instruction that says that once you have disarmed the aggressor, and once you are no longer in danger, the right to self-defense ceases.

That's what happened here. That's what this is about. One hit. It disabled her. She was no longer a threat. That's the end of it. Nothing else happened. Mr. Davis was no longer in danger, and he no longer took any steps towards Miss Alexander.

And also keep in mind the fact that he stood over her and said, "Oh, my God. Oh, my God, what have I done? Baby, baby."

All he wanted to do was to get the knives out of her hands. And yes, he panicked. Unfortunately, he left. But that doesn't mean he didn't act in self-defense. That doesn't mean he wasn't entitled to defend himself. Because clearly, on the facts presented to you, he was.

We don't have any evidence whatsoever saying that Miss Alexander did not charge Mr. Davis with knives. We don't have any evidence refuting the statement that she was swinging the knives at his head and throat area.

All we have are her statements saying that she had the knife, one from Sergeant Sanford, then a more detailed one from Nigel Phillips, where we learn what she did with the knives.

Ladies and gentlemen, it's the prosecutor's obligation and burden to prove that she didn't have the knives, she didn't pull the knives, she didn't approach Mr. Davis with the knives, she didn't swing the knives at Mr. Davis. He can't do that, because the evidence is clearly to the contrary. It's right there. No doubt whatsoever that he was entitled to defend himself.

The prosecutor has to prove to you beyond a reasonable doubt that he was not entitled to defend himself. And if you think that, oh, well, maybe, maybe he wasn't entitled to defend himself, your verdict is not guilty. If you think possibly, perhaps, he wasn't entitled to defend himself, your verdict is not guilty. If you think probably he was not entitled to defend himself, your verdict is not guilty. You have to believe beyond a reasonable doubt the highest standard of proof in this land, that this man was not entitled to defend himself when he's being charged at by a woman who was drunk and holding two knives.

I ask you to spend a lot of time looking at the witnesses who testified, weighing the testimony, looking at the holes, evaluating the missing pieces that are acknowledged by the prosecutor. And, ladies and gentlemen, when you do that, there is only one conclusion that you can reach. The prosecutor hasn't proven a thing. He has proven that she was injured. He has proven that there was a fight. He has proven nothing, absolutely nothing more.

When you look at the nature of the injury, whether it's quarter sized on the top of the head, determine for yourself. He would have you believe that Miss Alexander, during the entire time, is looking straight ahead, with her head straight up.

I submit to you that if, in fact, she is swinging knives like she says she was, and if, in fact, while she's swinging these knives, she's going in like this, she can get hit on the top of the head. The fact that she's hit on the top of the head is no more proof that she is sitting down than the prosecutor has proof of anything else in this case.

Also look at the fact that she was in the hospital for about a day and a half, two days. A lot is made regarding a vein that runs underneath the skull.

Well, that has nothing to do with us. Again, that's an effort on the part of the prosecutor to have you focus on things that have nothing to do with this case. There is no indication, no evidence whatsoever that the integrity of that vein at any time was threatened.

I submit to you that had it been, this would have been much more than a two-day stay in the hospital. And had it been as serious as the prosecutor would have you believe, it would have been much more than a two-day stay in the hospital.

The prosecutor gets to speak to you one more time. And I ask you to keep in mind his own words when he talks to you: "There are a lot of pieces missing. We're all wondering what went on at 215 Blythdale on February the 1st." Once again, ladies and gentlemen, that is reasonable doubt in our criminal justice system.

Thank you very much.

THE COURT: Anybody want to stretch for just about a couple minutes? Do you want to stand up and stretch?

(Pause in proceedings)

THE COURT: About set? Okay.

(Pause in proceedings)

THE COURT: Okay, Mr. Brass, go ahead.

MR. BRASS: Thank you, Your Honor.

CLOSING ARGUMENT

Mr. Brass: I'll be brief. And let me start where he left off.

His arguments include such things as the skull fracture not being that serious because she gets out of the hospital two days later.

Dr. Gauger told you. It wasn't my words. I didn't make this up. Dr. Gauger told you there is nothing trivial about this injury. It's a serious injury. We don't have to be doctors to know a fractured skull is serious, no matter now long you spend in the hospital.

There is a piece of evidence that's very important that is easily overlooked in this case. It's a piece of silent evidence. Where is Ms. Alexander's heart? Where is her heart? We talk about her head, but where is the heart?

The heart's over here; right? She's talking to his investigator. She's giving him a statement that totally exonerates him, totally exonerates. He's an innocent man. She's on his side.

Well, that's fine. She sits on that story until last Thursday, from February 1st. And my question is this: where is she? Yeah, I have the burden. But they have the same subpoena power I do. They can bring in witnesses, too. They can bring them in here. Under court order, just like I can. It's the same exact power.

Here is a witness — they have one self-defense witness, only one. The one witness is Ms. Ella Alexander telling Nigel Phillips what happened.

Well, why not bring her in? Obviously, she's entirely committed to this side of the courtroom, entirely committed to defending this guy. So where is she?

I testified in this trial. It's unusual. I sat in that trial. That's a tough chair. That's a hard place to be when you're telling the truth. It would be intolerable to sit up there and tell a story that isn't true. That's why she is not here.

You can look at that. You can evaluate that. Why didn't she come in? She's got a lot to say. She's the self-defense witness. You heard evidence. I tried to bring her in. I sent investigators to her house when her phone was disconnected. I called her 20 times at least.

I tried to bring this woman to you. She would not come in. Well, last Thursday, she's giving statements about what happened to help this guy, and she didn't come in.

That's a big part of this case. That's a big piece of evidence that shouldn't be ignored.

Now, about self-defense and her charging at him. On the 911 tape — and I know it's hard to understand — there is a lot of extra sounds on that. Particularly hard to understand right at the beginning — it's hard, because Glory Persons is frantically trying to save her daughter's life at that point. She's on speakerphone. It's right in the tape, if you listen to it. It says — the operator says to Ms. Persons: "I can't hear you. You know what? It's because — are you on speakerphone?"

That seems unusual to make an emergency call on speakerphone.

You know what the response is from Ms. Persons? And you can hear it. "He took the receiver." He took the phone. She's bleeding, cracked skull, hammer to head. You know what he does? He runs; he takes the phone.

It so happens the phone has a speakerphone function, thank goodness. But that's a big fact. How did he get the phone? How about that? How is she going to get an ambulance? Oh, no, he panics, so that makes it okay. He's running out the door now. "Oh, baby, oh, baby, but I'm gone. Let me grab that phone and my hammer, and I'll just be out of here."

That's what he does. You're telling me that's self-defense? Interesting.

Evidence of these knives. I guess while Ella is bleeding, we're supposed to assume that Glory, she's picking up knives, making the case clean for me.

She's picking up the knives because Officer Salazar gets there, no knives, doesn't see one. Maybe it's just like Ella said, hidden under the couch. Yeah, she grabbed it, but she didn't have it in her hand.

And where is Ella, the charging marauder with the two knives? She's right in front of the couch, immediately in front of the couch.

Members of the jury, ask yourselves this: who told you to distrust Ella Alexander? Leland Davis. He said, "Distrust her."

Well, that's his only witness. He brought her in through Nigel Phillips, and he's saying: Don't trust her, oh, but trust her in the things that establish self-defense, but not in anything else. Trust this ludicrous story that doesn't match the evidence, doesn't match the nature of the injury, doesn't match two statements given by two women at two different times at two different locations. Oh, yeah, trust her only in the things that help me.

He talks about reasonable doubt. There is a hope in all cases that you go back in the deliberations room and you say, you know, pieces missing, we don't know exactly every step of the way what happened, so not guilty. Right? There is a hope of that.

I'm hoping for more. I am hoping for more. And I'm basing that hope on the evidence, not on just blind hope, not on recent concern over domestic violence. I'm hoping for that based on the evidence, because the evidence you have all points one way.

(Noise interruption)

MR. BRASS: Maybe I'll wait for that to stop.

THE COURT: It's somebody's —

MR. BRASS: I'm not going to choose that as my theme song.

(Laughter)

MR. BRASS: Mr. Davis says that there are no borders around the puzzle. Maybe he's right. But there is a big piece in the middle, big piece in the middle of that puzzle, and that's her injured. I keep saying it over and over again. She's in the blood; she's got the fractured skull; the doctor sees it. That's a big piece.

Reasonable doubt is this. You walk in there with Officer Salazar, no question: we got her injured; we got her there. And you say, well, must be her fault. There better be one good reason, a great reason, for you to say this is her fault. So let's look for that reason.

And another thing. Mr. Davis is an excellent defense attorney, but probably wouldn't make a good police officer. If he wants Officer Salazar to arrive there, see Ella in the state she was in and to ask her, "Did you have knives? Let me put this towel on your bleeding head. Oh, did you have a knife? Was this your fault? Did you attack him first?"

I think not. That's not the way cops act. We shouldn't expect that from Officer Salazar or any officer. That's ludicrous.

Also, in the statement given to Nigel Phillips, another reason to disregard it is she tells him she comes after him with all these knives, right, she's coming after him, she's marauding with these knives.

Well, Nigel Phillips is an investigator. He's been an investigator for years. Aren't you wondering why, why did she come after him? Why did she do that? What made her so mad? He didn't even ask her. Didn't bother to ask her. "Oh, because we were arguing." Well, I want to know more than that. He didn't ask that question. That statement is profoundly unbelievable.

This guy hit her with a hammer. He came down the stairs with the phone in one hand, the hammer in the other. He runs with the phone. He's got a great big "guilty" sign hanging around his neck, and I expect that that will be your verdict.

Thank you.

* * *

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
HONORABLE ROBERT L. DONDERO,
JUDGE PRESIDING
DEPARTMENT 21

PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff

VS. ACTION NO. 170421

ANTHONY T. DAVIS
Defendant

We, the jury in the above entitled action, request the following:

the testimony by Sgt. Sanford regarding the physical confrontation between the victim & defendant

This 15th day of July, 1998

James Mitchell
Foreperson

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
HONORABLE ROBERT L. DONDERO,
JUDGE PRESIDING
DEPARTMENT 21

PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff

VS. ACTION NO. 170421

ANTHONY T. DAVIS
Defendant

We, the jury in the above entitled action, request the following:

Testimony from Officer Salazar regarding Miss Person's description of Miss Alexander's position prior to being struck.

Same information from Sgt. Sanford's testimony.

This 15th day of July, 1998

J. Mitchell
Foreperson